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REPORTS OF CASES

DETERMINED IN THE

Supreme Court

OF THE

STATE OF WASHINGTON

CONTAINING

DECISIONS RENDERED FROM MAY 4 TO SEPTEMBER 19,
1903, INCLUSIVE.

EUGENE G. KREIDER,
REPORTER.

Volume XXXII.

BANCROFT-WHITNEY CO.,
LAW PUBLISHERS AND LAW BOOK SELLERS,
SEATTLE AND SAN FRANCISCO.
1903.

Rec. March 31, 1904.

PRINTED, STEREOTYPED AND BOUND
BY
THE GRAHAM-HICKMAN COMPANY,
SEATTLE.

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ERRATA

Page 234. Last line on page, read *Gould* in place of "Gold."

Page 294. Title of case, read *Tieman, Appellant*, in place of "Tieman, Respondent."

Page 446. Tenth line from bottom, read 147,976 in place of "147,895."

REPORTS OF CASES

DECIDED IN

THE SUPREME COURT

OF THE

STATE OF WASHINGTON

[No. 4474. Decided May 4, 1908.]

CALLIE HUGHES, *Appellant*, v. NEW YORK LIFE INSURANCE COMPANY, *Respondent*.

INSURANCE — ACTION ON POLICY — ESTOPPEL.

The fact that plaintiff was misled by a mistake of defendant into abandoning a contemplated action on a policy of life insurance for a larger sum, and induced into commencing another one on the strength of defendant's admission that the insured had signed a substituted application calling for a different form of policy, would not estop defendant from setting up the truth, where there is no showing that the contemplated action was a valid one and is no longer open to plaintiff, and the costs of the present action appear to be the only injury suffered.

SAME — PLEADING — ISSUES.

In an action on a policy of life insurance, to which the company set up the defense that the application therefor had never been signed by deceased and that the copy furnished plaintiff purporting that he had signed same was a mistake on the company's part, the sustaining of a demurrer to a reply setting up estoppel to deny the signature, but which failed to deny the affirmative allegations of the answer, would leave no issue upon the genuineness of the signature of the insured.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

Benson & Aust, for appellant:

That the facts as shown by the records in this case make a clear case of estoppel in favor of appellant seems to be shown by the following cases: *Meister v. Birney*, 24 Mich. 440; *Polk v. Williams*, 52 S. W. 34; *Van Eter v. Crossman*, 4 N. W. 216; *Robb v. Shepard*, 15 N. W. 76; Bigelow, Estoppel, 621.

Emmons & Emmons and *H. T. Granger*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant is the widow of Archie Hughes, deceased, and the respondent is a life insurance company. On August 27, 1898, Archie Hughes made application to the respondent, through its agent at North Yakima, in this state, for a policy of insurance for the sum of \$1,500 on the company's "Ordinary Life, 20 Year Accumulation Plan," with premium return equal to all premiums paid, paying to the agent the first premiums of \$41.25, who gave him a receipt therefor acknowledging the payment, and agreeing to return the amount paid in case the application should not be accepted by the company. The company, on receipt of the application, declined to accept it on the plan applied for, but offered to accept it on their "Adjustable Accumulation, Ordinary Life, 20 Year Accumulation Plan," with life lien, but without premium return. Under this plan the amount payable in case of death the first year was \$920.20, which amount would increase yearly thereafter by the amount of the annual premium of \$37.05 until the premiums added to the first sum amounted to \$1,500. A policy was accordingly prepared on this plan, and sent to the agent, to be delivered to the applicant on his acceptance thereof, to

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be indicated by his signature to an amended application, a form for which was sent with the policy. This policy was not delivered, but was returned to the company under date of October, 1898, and afterwards canceled by it. In November following the cashier of the respondent's North Pacific branch office telegraphed the respondent to forward the policy, saying that the agent could deliver it. On receipt of the telegram a new policy was made out by the company, being a duplicate of the former one, with the exception that the insurance was to begin on a later date, and forwarded the same to the agent, to be delivered on the applicant's signing the amended application. This policy was also returned to the company under date of the 25th of November, 1898, with the information that it could not be delivered. On December 5th, following, in accordance with the practice of the company, a circular letter was sent to Mr. Hughes, calling his attention to the fact that the policy issued on his life had been returned and canceled, and asking why it was not accepted. To this Mr. Hughes replied that he had not seen any agent of the company since he made application for the insurance and paid the premium to the agent. The company then took the matter up with their branch office. The cashier of the branch office wrote Mr. Hughes, inquiring concerning the matter, and received a reply from him in effect the same as his former letter to the company. Pending the settlement of the matter, Mr. Hughes died. After his death the attorneys for Mrs. Hughes took up the matter with the company, who, at their request, forwarded them copies of all of the papers in its possession regarding the matter, including the original application, the proposed amended application, the policy proffered thereunder, and the correspondence had between the company and Mr.

Hughes and the company and its several agents. In the same letter it stated it had nothing to show whether the premium had been returned to Mr. Hughes or not, but that, if it had not been so returned, it would pay it back on the return of the receipt given therefor. In transcribing the proposed amended application it was made to appear that it had been signed by Mr. Hughes. The appellant thereupon commenced this action for the sum of \$957.25, being the amount that would have been due upon the policy offered to Mr. Hughes by the company, had it been accepted, on death occurring during the second year of the existence of the policy. In her complaint the appellant declared as upon an executed contract of insurance, she averred the making of the original application, the payment of the required premium, and the refusal of the company to issue a policy thereon. She then averred the execution and delivery by her husband of the amended application, setting the same out as it appeared in the copy sent her attorneys by the respondent, and averred that the company issued and forwarded for delivery to her husband a policy of insurance in pursuance thereof. The company denied that the second application was ever executed by the applicant, Hughes, or delivered by him to the respondent, or that it had ever delivered or contracted to deliver to Hughes a policy of insurance, and pleading affirmatively the facts substantially as we have recited them. To the answer the appellant replied that neither she nor her attorneys had any knowledge of what had transpired between the applicant and the respondent, but that her attorneys had written the respondent inquiring concerning the facts, and that in response to such inquiries the respondent had forwarded them copies of the application and the amended application and insurance policy as set out

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in the complaint; that the appellant and her attorneys relied upon such information, "and especially upon that portion thereof which purported to be the signature of Archie Hughes to his said amendment to his application, and that this action was brought relying thereon in the belief by appellant and her attorneys that Archie Hughes had in fact signed said amendment to said application." She further averred that her counsel had been intending and expecting to bring an action on a contract of insurance for the sum of \$1,500, but, on receiving the several papers set out from the company, they abandoned all thought of such an action, and instituted the present one. She prayed that the respondent be adjudged to be estopped from asserting that Archie Hughes had not in fact executed the amended application. A demurrer was interposed and sustained to the reply, and on a trial had on the remaining issues the appellant was nonsuited.

Two questions are urged on the appeal: (1) Did the court err in sustaining the demurrer to the reply? and (2) did the court err in granting a nonsuit?

1. The doctrine of estoppel is of equitable origin, and is founded upon principles of equity and justice. It is applied to conclude a party who, by his acts or admissions, has influenced the conduct of another, only when in good conscience and honest dealing he ought not to be permitted to gainsay them. When an admission is relied upon to work an estoppel, and it has been made by mistake, or without any intent to injure another, it is only in extreme cases that the law will not permit the party making the admission to show the truth. Before that result will follow, it must appear that the admission was made under circumstances showing gross, if not culpable, negligence; and the other party must have acted thereon to his ma-

terial injury. The reply of the appellant does not make a case within these principles. While she alleges she abandoned a contemplated action for a larger sum, and commenced the present one on the strength of the respondent's admission, she does not allege that her contemplated action was a valid action, nor one in which she had reasonable cause to believe she could recover; nor does she allege that the same is not now open to her. Her only injury, therefore, has been the costs of the present action; and costs incurred in litigation are insufficient to constitute the basis of an estoppel. *Warder v. Baker*, 54 Wis. 49 (11 N. W. 342); *Frei v. McMurdo*, 101 Wis. 423 (77 N. W. 915).

2. On the trial of the cause the appellant introduced in evidence the correspondence between her attorneys and the respondent, the several copies of the instruments set out in the complaint, and then offered to show that she commenced this action relying upon the admission contained in the copy of the amended application above mentioned, and was misled thereby. This proffered evidence was rejected by the court, and, as we have before stated, a nonsuit entered against the appellant. The appellant now insists that she was entitled to go to the jury on the question whether or not the amended application was in fact signed by Archie Hughes, of which fact, she contends, the admission of the respondent was some evidence. But appellant has apparently overlooked the fact that this question was not in issue. True, the appellant alleged that it had been so executed in her complaint, which was denied in the answer; but the answer also affirmatively set forth the entire transaction between the respondent and the applicant, Hughes, in which it was averred specially that the amended application was never signed. The reply did not put in issue the truth of the affirmative matter thus

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set up in the answer, but sought to avoid its effect by pleading matters which were thought to stop the assertion of the truth. When the reply was held insufficient, therefore, there was no issue of fact on the question suggested to submit to the jury, and hence there could be no error on the part of the court in refusing so to do.

The judgment is affirmed.

MOUNT, DUNBAR, ANDERS and HADLEY, JJ., concur.

[No. 4392. Decided May 5, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH MELVERN, *Appellant*.

CRIMINAL LAW — INFORMATION — JURISDICTION OF COURT — PRESUMPTIONS.

In a prosecution by information, it will be presumed, in support of the jurisdiction of the superior court, in the absence of a contrary showing, that the defendant was not at the time under indictment for the offense with which he is charged, that the court was in session, and that the grand jury was not in session when the information was filed.

SAME — QUASHING INFORMATION — GROUNDS.

Under Bal. Code, § 6892, prescribing the grounds for setting aside an information, it was not error for the court to refuse to quash an information upon the alleged grounds that no warrant had ever been issued for the arrest of defendant, that he had never had a preliminary examination, and that, at the time the information was filed, he was restrained of his liberty.

SAME — PROSECUTION BY INFORMATION — ALLEGATION OF PREREQUISITES.

The existence of the facts or conditions which the statute enumerates as prerequisites to the right to prosecute by information need not be set forth in the information itself.

SAME — JURISDICTION OF PERSON OF ACCUSED.

The fact that a defendant was arrested, in the first instance, by a person not having a lawful warrant therefor would not be

ground for reversal of the judgment for lack of jurisdiction of the person of defendant, when it appears that he was in fact in the custody of an officer, was present in court on the day of his arraignment, entered a plea of not guilty, and was in court throughout the trial.

TRIAL — COMPETENCY OF EXPERTS — BY WHOM DETERMINED.

The competency of a witness to express an opinion upon a professional or scientific matter is a preliminary question for the trial court to decide.

SAME — OBJECTIONS TO EVIDENCE — WITHDRAWAL.

Objections to testimony will not be considered on appeal, when the objections were immediately withdrawn in the trial court, after being made there.

SAME — TIMELINESS OF OBJECTIONS..

An objection to a ruling of the court on the admission of evidence must be interposed, under Bal. Code, § 5055, at the time it was made, and not afterwards.

WITNESSES — CROSS-EXAMINATION OF ACCUSED.

Cross-examination of the accused, when testifying in his own behalf, as to his past life, conduct, habits, and associates was proper, where, in his direct examination, he had given testimony as to his life, occupation, and habits at the various places where he had resided from childhood down to date of the crime with which he was charged.

SAME — CREDIBILITY.

Where an accused testifies in his own behalf, he is subject to cross-examination to impair his credit as a witness to the same extent that any other witness is.

MURDER — EVIDENCE — TESTIMONY OF NON-EXPERTS.

Testimony relative to the probable distance at which a revolver was held from the head of deceased when it was discharged by one who had experimented with the revolver for the purpose of ascertaining at what distance powder marks similar to those on the face of deceased would be produced is not expert testimony and therefore would not require that the witness qualify as an expert.

SAME — INSTRUCTIONS — OVERCOMING PRESUMPTION OF MURDER IN SECOND DEGREE.

An instruction that "where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, it must establish the characteristics of that crime, and if

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the prisoner would reduce it to manslaughter the burden is on him," is not open to the objection that it charges the jury the burden is on defendant to prove himself not guilty of murder in the second degree.

SAME — INTEREST OF ACCUSED.

An instruction that the jury have a right to take into consideration the interest in the verdict of a defendant who has testified in his own behalf is not erroneous on the ground of prejudicing the defendant by specially directing attention to his testimony.

SAME — ACCUSED AS WITNESS — FALSUS IN UNO FALSUS IN TOTO.

An instruction that a defendant upon the witness stand subjects himself to all the rules governing the credibility of witnesses, among them the rule that if the jury believe any witness has sworn falsely as to anything material to the issues, they are at liberty to disregard his entire testimony, except where it is corroborated, is a correct statement of the law.

Appeal from Superior Court, Snohomish County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

J. W. Heffner (*S. A. Bostwick*, of counsel), for appellant.

H. D. Cooley, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

ANDERS, J.—The defendant, Joseph Melvern (appellant here), was convicted in the superior court of Snohomish county of murder in the second degree, upon the trial of an information charging him with murder in the first degree for the killing of one Clara Melvern by shooting her with a pistol. A motion for a new trial was filed and overruled, and the court thereupon sentenced the defendant to the penitentiary for the period of twenty years. The information on which the appellant was tried was filed on March 1, 1902. On April 28, 1902, the appellant filed a motion to set aside the information, which motion was denied and an exception noted. Immediately

thereafter a demurrer to the information was filed which the court overruled, to which ruling the appellant excepted. The superior court was asked to quash and set aside the information upon the ground that the defendant had been held and confined in the jail of Snohomish county, Washington, since February 21, 1902, without due process of law, for the reasons: (1) That no warrant had ever been issued for his arrest upon any charge; (2) that he had not been held by virtue of any warrant issued upon any charge; (3) that the defendant had never had a preliminary examination in this cause before any committing magistrate; (4) that at the time the information in this cause was filed the defendant was restrained of his liberty, and, by reason of the premises, the court had no jurisdiction over the person of the defendant. This motion was based on the affidavit of the defendant, filed therewith, and the records of the cause. It is insisted by the learned counsel for appellant that the court erred in denying this motion for the reason that the prosecuting attorney had no right or jurisdiction, under § 6802, Bal. Code, to file the information prior to the filing of a complaint charging the appellant with the commission of an offense, and a hearing thereon before a committing magistrate. Subdivision 4 of said § 6802 provides that offenses may be prosecuted in the superior courts by information, "Whenever a public offense has been committed, and the party charged with the offense is not already under indictment therefor, and the court is in session and the grand jury is not in session or has been discharged;" and there is nothing in the affidavit upon which the motion was based, or elsewhere in the record, showing that the appellant was already under indictment, that the court was not in session, or that the grand jury was in session, at the time the information

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was filed. And, inasmuch as the superior courts of this state are courts of general jurisdiction, it must be presumed that the trial court had authority to entertain a prosecution of the appellant by information, although the record does not affirmatively show the existence of the conditions under which an information may be filed. In other words, it will be presumed, for the purposes of this case, in the absence of a contrary showing, that the appellant was not already under indictment for the offense with which he was charged, that the court was in session and that the grand jury was not in session when the prosecuting attorney filed his information. See *State v. McGilvery*, 20 Wash. 240 (55 Pac. 115); *Nichols v. State*, 127 Ind. 413 (26 N. E. 839). Moreover, no provision is made by our statute for quashing an information upon the grounds specified in appellant's motion. See Bal. Code, § 6892. We think the motion to set aside the information was properly denied.

It is also claimed that the court erred in overruling the appellant's demurrer to the information. The demurrer was predicated upon two propositions, the first one being that the information did not substantially conform to the requirements of the Code, and the second that the facts charged did not constitute a crime under the laws of the state of Washington. And it is argued in support of the demurrer that the information does not allege the existence of the conditions necessary to authorize the prosecution of appellant by information, and particularly that it does not aver that appellant had been held to answer the charge preferred against him, by a duly authorized magistrate. This contention is untenable. It has been held, on several occasions, by this court, that the existence of the facts or conditions which the statute enumerates as pre-

requisites to the right to prosecute by information need not be set forth in the information itself. See *State v. Anderson*, 5 Wash. 350 (31 Pac. 969); *State v. Munson*, 7 Wash. 239 (34 Pac. 932). And the ruling of this court upon this question seems to be in accordance with the decisions of the courts of other states, under statutes similar to ours. See 10 Enc. Pl. & Pr. 460, and cases cited in note 1. It is shown by the above mentioned affidavit that no warrant was ever issued for the arrest of the appellant, and it is, therefore, strenuously insisted that the court never acquired jurisdiction of the person of appellant, and consequently had no right to compel him to go to trial. But it appears that appellant was in fact in the custody of an officer, that he was present in court on the day of his arraignment, that he entered a plea of not guilty to the information, and that he was in court throughout the trial. Under these circumstances we have no doubt that the court had jurisdiction of the defendant. See 1 Bishop, New Criminal Procedure, § 179; *Kerr v. Illinois*, 119 U. S. 436 (7 Sup. Ct. 225); *State v. Ray*, 50 Iowa, 520. We are unable to perceive why the alleged irregularity in the manner of bringing the appellant before the court entitled him to immunity from trial for the offense with which he was charged in the information. The court might have caused a warrant to be issued for the arrest of appellant at the time of the trial, but that was unnecessary, because he was already in court in charge of the sheriff. There is nothing in the record indicating that he objected to the manner of his arrest or detention, at any time prior to the day of trial. If he was illegally restrained of his liberty while in the county jail, he might have obtained redress by an appropriate proceeding in court; but the mere fact that he was arrested, in the first instance, by a person not

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having a lawful warrant therefor, and detained by him, constitutes no ground for the reversal of the judgment.

At the close of the state's evidence counsel for the defendant requested the court to direct a verdict of acquittal. The court declined to direct the jury as requested, and its action in that regard is assigned as error. The evidence adduced by the state tended to support the allegations of the information and therefore the court did not err in denying the defendant's motion. The evidence on the part of the state tended to establish the following facts: In the month of September or October, 1900, appellant was engaged as a piano player in a certain saloon and dance hall in the city of Portland, Oregon. He there became acquainted with deceased, then known as Gertie Ambrose, and in about two weeks they began to live together as husband and wife, and thereafter she was known as Clara Melvern. After living together two or three months in Portland, they moved to Everett, and afterwards to Snohomish, Washington. During the time they resided in Portland, the appellant, on several occasions, while under the influence of liquor, ill-treated and abused the deceased, Clara Melvern, without any apparent reason therefor. At one time he struck her over the head with a pistol; at another, pulled her hair, and still at another stabbed her with a knife, thereby inflicting a wound which confined her to her bed for two or three weeks, and which left a scar which was visible upon her body after death. He threatened to kill Clara "if she ever done any trifling on him." In July, 1901, and for several months thereafter, appellant and the deceased lived in a "shack" in the city of Everett. Within twelve feet of this shack lived a family by the name of Parker. On one occasion Mrs. Parker was awakened by a sound as if the deceased was being

choked. She testified that she heard the deceased cry out, and then it sounded as if she was being smothered about the throat. On other occasions this witness was awakened in the night by loud talk by appellant, but could not understand what he said. About one o'clock one night in February or March, 1901, appellant and the deceased went to the Summit hotel, in Everett, and engaged a room. Soon after their arrival, Mrs. Lindsay, the proprietor, hearing a disturbance, went out into the hall where they were to ascertain what they were doing. The appellant was then trying to take something out of his trunk, and the deceased was trying to prevent him. Mrs. Lindsay conducted them to their room and then went to bed. She heard some noise after they went into the room. followed by a crash, which was afterwards shown to have been caused by a pistol shot, fired in their room, breaking the mirror on the "dresser." A witness, who was sleeping in an adjoining room on that night, heard the shot, and immediately thereafter heard a man in the room where the shooting occurred say, "I'll let you know when I'm going to kill you." At the time the appellant and the deceased came to the hotel no indication of a wound was noticed upon the face or forehead of the deceased; but the next morning her head was tied up, and she had a wound on her forehead over her eye which she, in the presence of the appellant, said she received the previous night by falling on the sidewalk. The following further facts are fairly established by the state's evidence, as they are practically undisputed: For about six weeks prior to the death of the deceased, she and the appellant lived over a laundry in the city of Snohomish, occupying two rooms, in one of which—the bed-room—the death occurred. The room across the hall from their bed-room was occupied by one

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Thiessen, and the room adjoining theirs was occupied by one Anderson. Mr. and Mrs. Johnson, the proprietors of the laundry, slept in the room next to the one occupied by Thiessen. On or about January 15, 1902, Anderson was awakened by some kind of an altercation in the room occupied by appellant and the deceased. He recognized appellant's voice, and heard a woman crying and declaring "I didn't." On several other occasions the same thing occurred in this room. One night, about the 22d of January, Anderson heard some kind of a tumult in their room, which he says sounded "like they made a rush from the kitchen, or the next room to it, in towards the wall, against the wall where I was sleeping, and bumped against the wall." It sounded like a heavy bump against the wall just above where their bed was standing. Following this he heard some one crying or sobbing, the sound appearing to come from "right close up to the wall." About four o'clock in the afternoon preceding the night of the alleged homicide, a witness, Mrs. Heppell, saw both the appellant and the deceased in their rooms in the laundry building. At that time the face of the deceased "was kind of colored up, and her eyes were red like she had been crying." From seven till ten or eleven o'clock on the night of the shooting the appellant was in the Magnolia saloon, in Snohomish, and engaged in playing the piano. From about twelve o'clock until about one o'clock he was in the Rainier saloon, playing cards. He drank some beer and lost some money at cards, and seemed to be restless and nervous. After he quit playing, he pulled his hat down over his eyes and sat there a short time in silence. Then he got up and walked out, and, in about a quarter of an hour after he left the saloon, the shot that killed Clara Melvern was fired. Mr. Johnson, who, with his wife, was sleeping in

his room across the hall from the rooms occupied by appellant and the deceased, testified that, between one and half-past one o'clock on that morning (February 21, 1902), he heard the appellant come up stairs and go into his room. "He walked a little faster than usual, and it was almost a run, you might call it." "Well, when he came up he walked almost in a run to their door, and opened it, and went in, and as soon as he got in I heard him talking to her, but I couldn't hear what he said." When he went into the room, the door was slammed shut. The talking continued for about ten minutes after he went in, and then it was quiet for five or six seconds. Then a shot was heard, followed by silence for fifteen or twenty seconds. Then the appellant opened the door of his bedroom, crying "fire" or "help," and went across the hall to the room occupied by the Johnsons, and told them his wife had shot herself, and asked Mrs. Johnson to go and help her. He was then completely dressed. The witness Thiessen was awakened by the talking in appellant's room. He did not understand what appellant was saying, but he heard the deceased say, "I didn't," which words were "hallooed out loud." Then he heard a shot, and heard something fall. As soon as appellant came to their door and gave the alarm, Johnson and his wife rushed to his room, without stopping to dress themselves. Mr. Johnson went into the bedroom and Mrs. Johnson stopped in the open doorway, which, as we understand the evidence, was about seven feet from the bed, the head of which was against or near the wall opposite to the door. When Johnson went in, he saw Clara Melvern lying on the floor, near the right side of the bed, lying from the head towards the foot, "flat on her back, with her hands down at the side." Her feet were up to the head of the bed and

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her head towards the door, but her body was not parallel with the bed. The back of her head was squarely on the floor, and where her head lay there was blood upon the matting on the floor. Her hands were open and her head was two feet and eight inches out from, and nearly even with, the foot of the bed. Mr. Johnson further testifies that Mrs. Melvern never moved while he was in the room, and that she was dead when he went in. Mrs. Johnson, however, thought she saw her "straighten out and turn her head to one side." But in this she must be mistaken, as other persons who came into the room a short time after Johnson entered found the body and head of Mrs. Melvern lying exactly in the position described by him. If she turned her head to one side, it would follow that the back of her head did not lie, as the other witnesses testified, "squarely on the floor." Soon after Mr. Johnson went into the room where the shooting occurred, he discovered a revolver, which was owned by appellant, lying midway between the sides of the bed, and about two feet from the foot-board, the muzzle pointing towards the head of the bed. After Johnson went into appellant's room, the latter went out in search of a physician, leaving Mrs. Melvern still lying on the floor. Johnson then dressed himself, and went out and told a policeman what had occurred. When he returned, he found the body of the deceased lying in the position in which he first saw it. A physician and the appellant were there, and a policeman was either in the room at the time or came in immediately thereafter. The doctor pronounced Mrs. Melvern dead, and noticed a bloody wound on the right side of her head. The policeman picked up the revolver, which was still lying on the bed, put it in his pocket and left the room, taking appellant with him. The pistol was a large one, and, at the

time the policeman took charge of it, the cylinder contained one empty and four or five loaded shells. In the afternoon succeeding the morning on which the deceased was killed, a jury was summoned by the coroner, and an inquest was held on the body of the deceased. It was found that there was a pistol shot wound on the right side of the head of the deceased, surrounded by powder marks covering a space about four inches in diameter, and that the bullet entered the head about two inches above the outer angle of the right eye, and ranged downward and backward, coming out two inches in front of the external opening of the left ear. A bruise was also discovered upon her face, consisting of four distinct marks, connected by a slight discoloration of the skin. There was a bullet hole in the plaster on the right side of the room, six feet and three inches above the floor, and the bullet was found lying on the floor immediately beneath this point.

We have thus set forth somewhat in detail, though not in full, the testimony given in behalf of the state, in order to show substantially what evidence was before the court at the time it refused to direct a verdict in favor of the defendant. It was conceded that the deceased came to her death from a shot from appellant's revolver, and that no one was in the room at the time of the tragedy except appellant and the deceased. But, it was contended in the court below, and is contended here, that the deceased herself fired the fatal shot, with suicidal intent. Upon the trial the appellant took the witness stand, and gave his version of the manner in which the deceased was killed. He stated, in substance, that he reached his room some time between one and two o'clock, and found the deceased up and dressed, and attending to her household affairs;

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that they had a conversation, during which he told her he had secured steady employment; that they had no quarrel, and no unpleasant words passed between them; that while they were talking he lay down on the bed without removing his clothes, and while there with his eyes closed, he heard a click or clicks, which must have been the sound made in cocking the revolver, and that this sound seemed to be right over his head by the side of the bed. As to what he heard and thought, as he was lying on the bed, immediately before he heard the report of the pistol, appellant testified at the coroner's inquest as follows: "I heard a kind of a click after I had been there ten or fifteen minutes may be. I didn't know what the click was, but thought she was pulling the cork out of the bottle to take a drink, and then I heard another click, and now I know it was when she was cocking the gun; but I was still wondering or thinking that she was taking a drink, and taking the cork out of the bottle, and wondering why it should make two or three clicks; I was thinking of that, and trying to understand how it was, when I heard the report of the gun." The appellant's eyes, according to his testimony, were closed when the shot was fired, but he instantly opened them, and saw the deceased in the act of falling to the floor. He sprang from the bed, and looked at her, but made no examination of her body to ascertain where she was shot, or the nature of her injuries. He did not attempt to raise her up, or to place her on the bed; did not touch her at all; but went for the doctor, after notifying the Johnsons that she had shot herself, leaving her lying on the floor just as she fell. The appellant, on his examination in chief, by his counsel, denied generally that he had ever mistreated the deceased in any manner whatever, and especially denied that he

shot at or towards her at any time while they were living together in Portland, and declared that the deceased herself fired the shot on the occasion mentioned by the witness for the state, while he was lying upon the bed in the outer room. But appellant says he does not know what she was doing, or going to do, with the pistol at that time, and does not remember what conversation was had between them, if any, in regard to that matter. He testified that the pistol shot which was heard in the room occupied by himself and deceased in the Summit Hotel was also fired by the deceased; that the crying heard by Mrs. Parker and other witnesses might have been caused by the toothache from which she was suffering, or by some little quarrels which they may have had. As to the stabbing of deceased, appellant claimed it was purely accidental and occurred while he was trying to take a knife out of the hands of the deceased; and that neither of them was angry at the time, or was aware that any injury had been inflicted, until a minute or two after it occurred. "We were still standing there laughing when she felt the blood; that was the first we knew she had been cut." The appellant admitted, however, that the wound was of such severity as to cause the deceased to remain in bed for a period of two or three weeks. The appellant further testified, in effect, that the noise which the witness Anderson heard, on the occasion mentioned by him, which sounded as if some person was thrown against the wall, must have been caused by appellant and deceased while they were scuffling and playing in their room; that the witness Regreth was mistaken in believing that he heard the words, "I'll let you know when I'm going to kill you" uttered in the room in the hotel immediately after the report of the pistol; and that the witness Thiessen

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must have been mistaken in thinking he heard the deceased say, "I didn't" in a loud tone of voice, just a few seconds before the shot was fired; or, if such words were spoken on that occasion or at any other time, they must have been used "in relation to staying in town or going away." "It would come about, for instance, if I would say that she wanted to stay in town, and she would say she didn't want to stay." Concerning the wound which Mrs. Melvern received upon her forehead over her eye, in Everett, and which Dr. Stauffer was called to treat, the appellant testified that it was caused by falling from the sidewalk while she and appellant were taking a walk, about midnight, before going to the hotel. This wound, according to the testimony of the doctor, was a jagged one, about three-quarters of an inch long, and "was quite a deep cut", "and had to be stitched up." But Mrs. Lindsay saw no bandage upon her head, or blood or dirt upon her face or dress, when they came to her house, or when she was showing them to their room. After the appellant was placed in custody, he was taken to the Magnolia saloon by the policeman, where he remained for some time. He spent the remainder of the night with another man in a room over the saloon. At no time during the night did he explain the circumstances connected with the tragedy. On the contrary, when he was interrogated by a certain person in the saloon as to the particulars of the transaction, he responded, "You are trying to pump me, are you?" and on being informed that that was not true, he said, "Well, if you had seen yourself, you would know you was."

The theory of the defense is that the deceased, at the time of the shooting, stood with her right side near or against the head of the bed, on the spot where her feet

rested after death; that she held the revolver in her right hand, and pointed it at her right temple, and, while doing so, inclined her head slightly towards the pistol, thereby giving the bullet a backward and upward course through the head and towards the point where it struck the wall; that the recoil and weight of the weapon straightened out the arm at full length, and, while the body was falling, the pistol naturally fell upon the spot where it lay upon the bed, which would be about nineteen inches from the hand if the arm was extended at full length; and that when the body had fallen to a point on a level with the bed, the bed would strike the arm and throw it along and parallel with the body as it lay upon the floor. And counsel for the appellant insist that their theory of suicide is the only reasonable one in view of the evidence in the case. On the other hand, the learned counsel for the state earnestly contends that the facts and circumstances, including the story told by appellant as a witness in his own behalf, disclosed by the record, completely negative the theory of death by suicide. The theory of the prosecution is that the pistol was fired by the appellant as he lay upon the bed, and while the deceased was in a stooping position by the side of the bed. And it is argued in behalf of the state that the unnatural and almost impossible position in which the pistol must necessarily have been held by the deceased if she fired the shot, the distance it was held from the head at the time it was discharged, the course of the bullet through the head, the relative positions of the body and the revolver as seen by Johnson when he rushed into the room, the frequent altercations between appellant and the deceased, the conduct of appellant in the Rainier saloon just prior to going to his room, his hurried manner in going up the stairs and through the hall to his room,

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and his conduct after the shooting are circumstances clearly inconsistent with appellant's innocence. The testimony as to these several matters has already been indicated in a general way. At the trial several physicians were called on the part of the state, as expert witnesses, who were of the opinion that the shot through the brain of the deceased produced instant death, and that, where sudden death is caused by such means, there can be no voluntary muscular movement on the part of the person killed, and in cases of suicide the pistol will ordinarily be found firmly grasped in the hand. The testimony of these witnesses seems to accord with the views expressed in the works on medical jurisprudence to which we have had access. In Vol. 3, § 302, of the fourth edition of Wharton & Stille's Medical Jurisprudence, it is said:

"In cases of suicide the weapon may be found grasped in the hand or not, according to the manner of death. Thus, if death ensue upon sudden and abundant hemorrhage, as in wounds of the throat, stabs in the heart or great vessels, the person dies by syncope, and hence, the hand being relaxed, the weapon falls from it. When, however, death is occasioned by a pistol-shot through the head, the weapon will, in most cases of suicide by this means, be found firmly grasped in the hand. In other cases where death has not been immediate, it is purely a matter of accident whether the weapon be still held by the deceased or not. In like manner, the position of the body will be affected by the suddenness and mode of death. Where death is sudden, the body will usually be found lying upon the back, but, if it have not been immediate, the face and trunk will generally be turned to the ground."

It is objected that neither of these physicians was competent to testify as an expert. The question of the competency of a witness to express an opinion upon a professional or scientific matter is a preliminary ques-

tion for the court to decide, and we do not think that the decision of the court in this instance is open to the objection urged against it.

At the trial one Woodard, a witness for the state, testified to some difficulty he and appellant had over the deceased, which occurred some time before the deceased and the appellant began to live together as husband and wife. And counsel for appellant claim that this testimony was irrelevant, and immaterial, and incompetent for any purpose. That it was subject to the objection now urged against it must be conceded, but, inasmuch as the objection which was made to the testimony was immediately withdrawn, it cannot be considered by this court.

During the progress of the trial one Miller, a witness for appellant, was recalled for further cross-examination by counsel for the state; and after he had testified that the appellant was in his saloon immediately after the death of the deceased, and that he then had a conversation with him in which something, but not much, was said about the shooting, he was asked if Melvern did not on that occasion say to him: "If I do have to die, I don't want to be hung," and this question was answered in the negative. The witness was then asked if he did not, at a time and place mentioned, tell Harry Knowles that appellant, Melvern, had so stated, and he answered that he did not. Both of these questions were asked and answered without objection. Subsequently Knowles was placed upon the stand by the state and interrogated as to this conversation, and counsel for the appellant then stated to the court, in effect, that they had objected to Mr. Miller testifying, or to Mr. Cooley asking Mr. Miller, for the purpose of cross-examination, any questions touching any conversation that was had in the saloon on the night that

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Melvorn was there immediately after the death of the deceased on the ground and for the reason that it was not proper cross-examination, and, if the state was allowed to do so it would be bound by the evidence. This was not properly an objection, but merely a statement that counsel *had* objected. An objection to a ruling of the court must be interposed, under our statute, at the time it was made, and not afterwards.

Objection is made by appellant to the testimony of Bakeman relative to the probable distance at which the pistol was held from the head of deceased when it was discharged, on the ground that the witness was not shown to be qualified to give testimony upon that subject. But it is a sufficient answer to this objection to say that the witness did not testify as an expert. Expert evidence was not required. This witness testified that he had measured the area covered by the powder marks upon the face of the deceased, and that he afterwards experimented with the same pistol that was found in appellant's room, as above stated, using the remaining cartridges, and discharging them at and against a piece of fresh hog skin at different distances; and he told the jury which shot caused marks upon the hog skin similar in extent and appearance to those upon the face of the deceased. He further informed the jury that when this shot was fired the muzzle of the revolver was nine inches from the point struck by the powder. We think that this testimony, though given by a "layman," was entirely proper. Moreover, similar experiments were made by a witness for appellant, who, using the same pistol, but a different kind of cartridges, fired at the smooth surface of a board. Nor do we think that the court erred, under the circumstances, in restricting the cross-examination of the witness Bakeman.

It is next alleged that the court erred in permitting counsel for the state, in the cross-examination of appellant, to propound certain questions to appellant touching his past life, conduct, habits, and associates, and in compelling him to answer the same over the objections of his counsel. It is claimed that these questions were objectionable on the grounds, (1) that they were incompetent and immaterial, and, (2) that it was not proper cross-examination. It appears from the record that the appellant, in his examination in chief, gave testimony as to his life, occupation, and habits at the various places where he had resided from the time of his childhood down to the date mentioned in the information. He thus laid the foundation for cross-examination upon matters which, in the absence of such testimony, might possibly have been deemed immaterial and irrelevant. Some of the questions objected to were unquestionably proper on cross-examination, even under the strict rule invoked by appellant. Others were apparently propounded for the sole purpose of impairing the credibility of the appellant, but these were answered in the negative, and the state was bound by the answers, and did not attempt to contradict him, as was done in *State v. Payne*, 6 Wash. 563 (34 Pac. 317), cited by appellant. Under our constitution a defendant in a criminal case can not be compelled to give evidence against himself, but when he voluntarily offers himself as a witness in his own behalf, and so testifies, he is "subject to all the rules of law relating to cross-examinations of other witnesses." Bal. Code, § 6941; Pierce's Code, § 2165. And, in case the accused testifies in his own behalf, he is subject to cross-examination to impair his credit as a witness to the same extent as any other witness is (Abbott, Trial Brief [Criminal Causes], § 396, and cases

cited); and, generally may be impeached in the same manner as any other witness (*State v. Duncan*, 7 Wash. 336, 35 Pac. 117, 38 Am. St. Rep. 888), "by reputation as evidence of character, by cross-examination to character, by conviction of crime, and the like;" "for otherwise, if he were a false witness, the customary methods of exposing this would not be available, and the investigation of truth and the punishment of crime would be defeated." 1 Greenleaf, Evidence (16th ed.), § 444b. See, also, Chase's Stephen's Dig. Ev. (2d ed.), art. 129, and especially note 2 and cases cited; Clark, Criminal Procedure, p. 550. It has also been held that if one charged with crime testifies for himself, and denies his guilt, he may be cross-examined as to any matters tending to establish guilt, whether specifically interrogated as to them or not. Abbott, Trial Brief, *supra*, § 394. See, also, *State v. Duncan*, *supra*. In view of the scope of the direct examination of appellant, and of the rules governing the cross-examination of witnesses, we conclude that the objection in question ought not to be sustained.

It is alleged that the court erred in giving to the jury instruction No. 16, which is in the following language:

"The court instructs you that where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, it must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter the burden is on him."

The objection to this instruction is that it "clearly tells the jury that the burden is upon the defendant to prove himself not guilty of murder in the second degree." But we do not think that the instruction is susceptible of such interpretation. The language is unambiguous, and its meaning apparent. A substantially similar instruction

was considered and sustained by this court in *State v. Payne*, 10 Wash. 545 (39 Pac. 157), on the authority of *State v. Cain*, 20 W. Va. 679, 709; *Hill v. Commonwealth*, 2 Grat. 594, and other cases cited in the opinion, and 2 Thompson on Trials, § 2208. This instruction is an exact copy of the form of an instruction given by Thompson in the section of his work on trials above noted; and the learned author, in a foot note to said section, says that, "The principle embodied in the above instruction is believed to be universally acknowledged."

The appellant also objects to instructions No. 18 and No. 21, given by the court, which are respectively as follows:

"18. You are further instructed that, while the law makes the defendant a competent witness in this case, yet you have the right to take into consideration his situation and interest in the result of your verdict, and all the circumstances which surround him, and give to his testimony only such weight as in your judgment it is fairly entitled to."

"21. If the jury believe from the evidence that any witness in this cause has wilfully sworn falsely on this trial, as to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his entire testimony except insofar as it has been corroborated by other evidence, or by the facts and circumstances proved on the trial. The defendant in this case having gone upon the stand as a witness in his own behalf, subjects himself to all the rules governing the credibility of other witnesses, and this instruction applies equally to him as well as to any other witness."

It is not claimed on the part of the appellant that these instructions do not state the law correctly. The only complaint is that the appellant was unnecessarily prejudiced by thus directing the attention of the jury especially to him. Instructions substantially like instruction

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No. 18, in the case at bar, have been frequently sustained by the courts. See *State v. Sterrett*, 71 Iowa, 386 (32 N. W. 387); *People v. Calvin*, 60 Mich. 113 (26 N. W. 851); *Haines v. Territory*, 3 Wyo. 167 (13 Pac. 8); *State v. Elliott*, 90 Mo. 350 (2 S. W. 411); *Territory v. Gonzales*, 68 Pac. 925, 932; *People v. Cronin*, 34 Cal. 204; *Anderson v. State*, 104 Ind. 467 (4 N. E. 63); *State v. Sanders*, 76 Mo. 35; 2 Thompson, Trials, § 2445.

In *Haines v. Territory*, *supra*, the instruction objected to was practically similar to that here under consideration, and, in regard thereto, the court said:

"It is conceded that the above instruction contains nothing but sound legal propositions, and the only complaint made is that defendants were singled out by the court from the body of the witnesses for comment. We do not think the court erred in giving the instruction as it did."

Nor do we perceive any error in the 21st instruction. It certainly states the law correctly, and it would therefore seem to be unobjectionable. *Rider v. People*, 110 Ill. 13. See, also, *Spies v. People*, 122 Ill. 1 (12 N. E. 865, 3 Am. St. Rep. 320).

Lastly, we are asked to reverse the judgment and dismiss the action upon the ground that the evidence is not sufficient to sustain the verdict. The evidence is exceedingly voluminous, and, we think, in some respects unnecessarily circumstantial. We have carefully read and considered all of the evidence, and we deem it sufficient to warrant the verdict of the jury.

No substantial error appears in the record, and the judgment is therefore affirmed.

FULLEERTON, C. J., and DUNBAR and MOUNT, JJ., concur.

[No. 4303. Decided May 6, 1903.]

JOHN McHUGH, *Appellant*, v. NORTHERN PACIFIC RAIL-
WAY COMPANY *et al.*, *Respondents*.

MASTER AND SERVANT — TORTS OF SERVANT — JOINT LIABILITY.

An action for tortious negligence may be maintained against the master and his employee jointly, where the injury was caused by the act of the latter (*Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, followed).

RAILROADS — INJURY TO EMPLOYEE — CONTRIBUTORY NEGLIGENCE.

In an action by a railway employee against the company to recover for injuries recovered by being struck by a fast passenger train while riding upon a hand-car a nonsuit was proper, when it appeared that the accident happened near a small station at which this train did not stop, but was accustomed to go by at full speed; that the plaintiff had worked for the company at that point for four years and knew the train was due and would pass at full speed; and that prior to the accident he was not looking and listening for it, and failed to notice the headlight until he was struck; there being no positive evidence that the whistle and bell were not sounded as was customary, but merely that the witnesses did not hear them.

Appeal from Superior Court, Spokane County.—Hon.
WILLIAM R. BELL, Judge. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant:

It is not negligence for a servant engaged as was the appellant to rely upon the customary signals being given. *Hooper v. Great Northern Ry. Co.*, 83 N. W. 440. The question of contributory negligence should be submitted to the jury. *Townley v. Chicago, M. & St. P. Ry. Co.*, 11 N. W. 55; *Burian v. Seattle Electric Co.*, 26 Wash. 606; *Nelson v. S. Willey S. & N. Co.*, 26 Wash. 548. It is only where the evidence is practically undisputed and the inferences deducible therefrom point to the conclusion that the plaintiff was at fault, and to that conclusion alone,

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that the court is justified in determining the question as a matter of law. *Dunlap v. Railroad Co.*, 130 U. S. 649 (32 L. ed. 1058); *Kane v. Railroad Co.*, 128 U. S. 91 (32 L. ed. 339); *Sioux City & P. R. R. Co. v. Stout*, 17 Wall. 657 (21 L. ed. 745); *Louisville & N. R. R. Co. v. Woodson*, 134 U. S. 614 (33 L. ed. 1032). It was a rule of the company, as well as their established practice and custom, when within the station limits to blow a whistle or ring a bell, and upon this reliance was placed by every person who used the track. *Howard v. Delaware & H. Canal Co.*, 40 Fed. 195; *Erickson v. St. Paul & D. Ry. Co.*, 5 L. R. A. 787; *Shannon v. Consolidated Tiger, etc., Mining Co.*, 24 Wash. 119.

Stephens & Bunn and *W. F. Townsend*, for respondents:

With the knowledge which plaintiff had concerning the approach of this train at that time and place, and his failure to keep out of its way, the question of fact whether the whistle was blown or the bell rung is utterly immaterial, so far as his right to recover is concerned. *McDonald v. International & G. N. Ry. Co.*, 22 S. W. 939. If the weather and other circumstances were such as to make it difficult to see or hear that train, then he should have taken other means to avoid being struck by it, and his negligence in not doing so is sufficient to defeat recovery. *Heffinger v. Minneapolis, etc., Ry. Co.*, 45 N. W. 1131.

PER CURIAM.—On the evening of December 6, 1898, appellant, who was an employee of the Northern Pacific Railway Company, and two fellow workmen, left Scott station, on the line of said railroad, on a handcar, and went west about five miles to do repair work on a bridge of said railroad. They left the bridge to return to Scott

station about three o'clock in the morning of December 7, 1898, and proceeded with the hand-car on the line of said railroad to said station, where they arrived about four o'clock a. m. on said date. In order to reach the hand-car house, where said car was kept when not in use, they passed Scott station, which is situate a short distance west of said car house. While proceeding between the station and the car house, a passenger train of the respondent railway company, running at great speed, came up behind the hand-car and struck it throwing appellant in such a manner that he sustained serious injuries. It was not the custom for this train to stop at that station, and it was the rule for it to pass at full speed, which fact was known to appellant and his companions. It is alleged, however, that it was the custom to blow the whistle and ring the bell upon all trains when passing said station, and that this was not done upon the train in question. Negligence is predicated upon the alleged failure to give these signals of approach, and damages in the sum of \$15,000 are demanded. Contributory negligence is alleged by respondents. A jury was impaneled to try the cause, and at the conclusion of appellant's testimony the respondents challenged the sufficiency of the evidence, and moved the court to discharge the jury and render judgment in favor of respondents. The motion was granted and judgment entered accordingly. From said judgment this appeal was taken.

We will first refer to the contention of respondents that the cause should have been determined upon the demurrer to the complaint. This contention is based upon the following ground: Appellant in his complaint joined as co-defendants the railway company and the respondent Matheson, who was the employee of the company as locomotive

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engineer in charge of the engine which was drawing the train when the accident occurred. It is contended that there can be no joint liability of the parties defendant in the complaint, for the reason that, if the railway company is liable at all, it must be not because of any act of its own, either by way of commission or omission, but by reason of the act of its servant, and by virtue of the doctrine of *respondeat superior*. It is also insisted that, if the servant is liable, his liability must be direct, because of his own personal neglect in failing to ring the bell or sound the whistle. Respondents rely largely upon the case of *Doremus v. Root*, 23 Wash. 710 (63 Pac. 572, 54 L. R. A. 649), but, since the briefs in the case at bar were prepared, this court has passed directly upon the question presented here, and against respondents' contention, in *Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569 (70 Pac. 1100). In that case the court said:

"But without entering into a discussion or an analysis of these conflicting opinions, considering the fact that universal authority will hold responsible in independent actions both the master and the agent or servant whose tortious act is the cause of the injury, and the holding of this court that as to the liability of the servant or agent there is no distinction between cases of misfeasance and those of nonfeasance, and in further consideration of the reformed procedure which obtains in this state, we are inclined to hold with those cases which permit the rights of all parties to be determined in one action, thereby discountenancing and rendering unnecessary a multiplicity of suits, rather than to compel the plaintiff to pursue and exhaust his remedy against one actor, and then, if compensation cannot be realized for the damage sustained, to proceed against another. We think this view is more in harmony with the spirit of our Code and modern procedure generally."

We think the opinion in the last named case, in its

analysis of *Doremus v. Root, supra*, shows clearly that the two decisions are not in conflict. The demurrer was therefore properly overruled.

The errors assigned by appellant, severally stated, all involve the one contention that the court erred in granting the challenge to the evidence, and in withdrawing the cause from the consideration of the jury. The evidence shows that, during the return trip from the bridge above mentioned to Scott station, the appellant rode much of the distance upon the hand-car, while his companions walked and pushed the car. The night was cold; there was snow upon the ground and upon the tracks, and they found it difficult, if not impossible, to propel the car by merely working the handles ordinarily used for that purpose. Appellant, being the oldest of the party, was requested to ride upon the car and keep the handles moving to prevent freezing, while those walking really propelled the car by pushing. In this manner they approached and were passing through the limits of Scott station when the accident happened. Appellant and the entire party knew that it was the time for the passenger train to pass. Appellant says he looked and listened for the train many times while they were making the trip from the bridge, and so continued to do until within a substantial distance of the place of the accident, when he ceased to look and listen. He says plainly that he did not look and listen after passing a certain curve. A question asked him suggests that the distance was 2,000 feet. The answer does not deny that the distance may have been as much as suggested, but simply designates its beginning point as being at the curve mentioned. There was no positive testimony that the whistle and bell were not sounded, but appellant and one other witness say they did not hear them, and

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give it as their opinion that, if the warning sounds had been given, they could have heard them. Appellant had worked for the respondent railway company about fourteen years, and had lived at Scott station and worked upon the railway line in that vicinity about four years. He knew the environment well, and knew that the fast passenger train, which always passed this station at a high rate of speed, was liable to come at any moment. Having been for so long a time an employee of the railway company, and, as such, being particularly informed about the time and speed of the train at that point, he was better prepared to protect himself than an ordinary passing traveler would have been. With all his knowledge of the surroundings, he did not look and listen for some time before the accident. He was not required to furnish any propelling power for the hand-car, but stood in an elevated position, where he could easily look out for the train. He was asked the following question: "And you did not see the head light until you were struck?" to which he replied: "I saw no light until after I was struck." It would seem that there can be no doubt about appellant's ability to have seen the strong headlight of the engine in time to have left the hand-car if he had been on the look out for it. As before stated, there is no positive testimony that the whistle and bell were not sounded, but the witnesses simply say they did not hear them. The night was cold, and the wind was blowing. There may have been room for difference of opinion as to whether the sounds might have been heard above the noise of the wind. But we do not see how there can be any difference of opinion upon the other point. It therefore follows that appellant's neglect so contributed to his injury that he is not entitled to recover. The passenger train had the full

right of way at that time, and it was the duty of every employee of the company to exercise care and keep out of the way of the train. We do not see how the minds of reasonable men can differ upon the question of appellant's negligence. It seems apparent to any reasonable mind that he did not exercise the prudence and caution which were required of him under the circumstances. In *Cooney v. Great Northern Ry. Co.*, 9 Wash. 292 (37 Pac. 438), a case somewhat similar to the one at bar, it was held that, even if it were conceded that the railway company was negligent, yet the want of care on the part of the respondent in the case precluded his recovery. The court said, at page 296:

"If the respondent had been in the exercise of that degree of prudence and caution which it was his duty to use under the circumstances, it is hardly possible to believe that he would have been injured."

The judgment in that case was reversed and a nonsuit ordered.

We believe the trial court in the case at bar did not err in granting the challenge to the evidence, and in withdrawing the case from the jury. The judgment is therefore affirmed.

[No. 4543. Decided May 6, 1903.]

PUGET SOUND IRON AND STEEL WORKS, *Appellant*, v. C.
H. CLEMMONS *et ux.*, *Respondents*.

SALES — WARRANTY — PAROL EVIDENCE.

Parol evidence of oral warranties is admissible where the only written contract in connection with the sale of machinery was an order for it in the shape of a letter, which did not purport to con-

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Argument of Counsel.

tain any part of the contract or conditions which the seller was to perform.

SAME — BREACH.

A warranty that a road engine was free from defects and imperfections and that the seller would replace all defective parts free of charge was broken, where the seller, after supplying new drums several times in place of those breaking because of defects in manufacture, refused to replace the last one breaking because of its inability owing to a strike at its works.

SAME — MEASURE OF DAMAGES.

The measure of damages upon the breach of a warranty to replace defective parts of a road engine free of charge to the purchaser would be the expense he was put to in replacing the broken parts elsewhere upon the seller's refusal to supply new ones, and would not include loss of profits in logging as within the contemplation of the parties, where the seller had no knowledge of the extent of the purchaser's operations, the number of logs he was hauling, the number of men or machines he was working, or the character or length of the roads the logs were hauled over (*Skagit Ry. & L. Co. v. Cole*, 2 Wash. 57, and *Graham v. McCoy*, 17 Wash. 63, distinguished) (DUNBAR, J., dissents).

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Reversed.

J. A. Hutcheson and Bates & Murray (John H. McDaniels, of counsel), for appellant:

The only warranty that could be implied arose from the fact that appellant was the manufacturer of the engine it was selling. This warranty would only go to secure against "latent defects, not disclosed to the purchaser, arising from the manner in which the article was manufactured." *Hoe v. Sanborn*, 21 N. Y. 552; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108 (28 L. ed. 86). The mere fact that a party purchasing articles intends to use them for a particular purpose does not charge the seller with an implied warranty that they will accomplish or fulfill that purpose. *Port Carbon Iron Co. v. Groves*, 68

Pa. St. 149; 2 Benjamin, Sales (6th Am. ed.), § 987; 1 Parsons, Contracts, pp. 586-588; *Wisconsin R. P. Brick Co. v. Hood*, 54 Minn. 543. When a person ordering a machine reduces the order to writing, he cannot prove any additional warranty by parol. *Shepherd v. Gilroy*, 46 Iowa, 193; *Seitz v. Brewers' Co.*, 141 U. S. 510 (35 L. ed. 837); *Wheaton Roller-Mill Co. v. Noye Mfg. Co.*, 68 N. W. 854; *Mullain v. Thomas*, 43 Conn. 252; *Milwaukee Boiler Co. v. Duncan*, 87 Wis. 120; *Nichols v. Crandall*, 6 L. R. A. 412; *Staver v. Rogers*, 3 Wash. 603; *Goulds v. Brophy*, 6 L. R. A. 392.

To the effect that the written order given in this case for the engine, when accepted, constituted a contract in writing that cannot be changed by evidence of prior conversations, see *Millett v. Marston*, 62 Me. 477; *Lamson, etc., Service Co. v. Hartung*, 19 N. Y. Supp. 233; *Diebold Safe & Lock Co. v. Huston*, 28 L. R. A. 53.

J. B. Bridges, for respondents:

Upon the point that the measure of damages upon breach of a warranty of a road engine sold to be used in the logging business would include the purchaser's loss of profits, the respondents cite *Herring v. Skaggs*, 62 Ala. 180; *Borradaile v. Brunton*, 8 Taunt. 535; *Passinger v. Thornburn*, 34 N. Y. 634; *Beeman v. Banta*, 23 N. E. 887; *Coyle v. Baum*, 41 Pac. 389; *Nye v. Snyder*, 77 N. W. 118; *Shaw v. Smith*, 25 Pac. 886 (11 L. R. A. 681); *Briggs v. Rumely Co.*, 64 N. W. 784; *Kester Bros. v. Miller Bros.*, 119 N. C. 475; *Brownell v. Chapman*, 51 N. W. 249; *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318; *Houser v. Pearce*, 13 Kan. 104; *Crescent Mfg. Co. v. Nelson Mfg. Co.*, 100 Mo. 325.

The opinion of the court was delivered by

MOUNT, J.—In May, 1900, respondent C. H. Clemmons purchased a logging engine from appellant. The engine was of appellant's manufacture, and the purchase price was \$2,500. Of this amount, respondents paid \$835, and for the balance gave three notes, of \$555 each. To secure the payment of these notes, respondents gave a chattel mortgage on the engine. One of the notes was subsequently paid, but respondents failed to pay the other two when due. Whereupon appellant brought this action to recover the amount of the two notes, and to foreclose the mortgage; alleging the execution and delivery of the notes and mortgage, the amount due thereon, and that \$175 was a reasonable attorney's fee for the foreclosure. Respondents answered, admitting the execution and delivery of the notes and mortgage, and the non-payment thereof, but denied that any attorney's fee should be allowed, and as an affirmative defense, alleged that the notes sued on were given as part of the purchase price of said engine; that the total purchase price was \$2,500, of which \$835 was paid in cash at the time of purchase, and notes given for the balance; that one of these notes for \$555 had been paid since. They further alleged that at and before the time of the purchase of the engine they informed appellant that they intended to use the engine to haul logs a distance of about 5,000 or 6,000 feet; that appellant represented the engine to be peculiarly fitted for such purpose, and represented that it was of the best material and workmanship, "and expressly orally warranted the said engine to properly and satisfactorily perform the duties and do the work for which the respondents were purchasing the same." They then alleged that the drum of said engine was of inferior material and defective workmanship and

did not do the work which appellant represented it would do; that the engine was on said account not worth to exceed \$1,000; and that there was want of consideration of at least the amount demanded in the complaint. By way of counterclaim, respondents alleged as a further defense that, at the time of the purchase of the engine, respondents informed appellant that they desired an engine of sufficient power and capacity to carry 5,000 feet of cable, and to haul logs that distance; that appellant represented its engine to be the best in the market for that purpose, and verbally warranted that it would for one year satisfactorily operate and perform said work, and warranted it to be of the best material and workmanship; that after the engine had been operated twenty-two days the drum broke; that appellant furnished another drum, which also broke after being used eleven days; that thereupon appellant furnished a third drum, which also broke, and this continued until five drums in all had been used and broken. All of these drums were furnished free of charge to respondents, except the expense of transportation, which is alleged to be \$100 on each of the extra drums; that these breaks occurred without fault or negligence on the part of respondents, and were due entirely to the use of defective material and unskilled workmanship in manufacture; that after the breaking of the fifth drum the respondents procured of another manufactory a good and sufficient drum at a cost of \$500; that on account of these different breaks the operation of the logging camp conducted by respondents was interrupted, men were kept in idleness, some of their men went away, and respondents suffered loss of profits, whereupon they demanded the cancellation of the note and mortgage, and a judgment against appellant for \$6,500 and costs. Appellant replied to the answer,

and denied making any warranty, or any facts amounting to a warranty, and alleged that respondents ordered an engine of the kind, quality, and description in every respect like said engine, including the drum; denied that the engine or drum was inferior or defective; alleged that appellant refused to warrant the engine; and denied that, aside from the mere agreement to furnish an engine of the description given by respondents, any other agreement was made, except to replace free of cost at appellant's works in Tacoma any defective parts, in case respondents should first return the defective parts, freight prepaid, to appellant in Tacoma. The case was tried in equity, a jury being called to render an advisory verdict for the guidance of the court. The court made findings of fact and conclusions of law. The facts were found for appellant as to the cause of action declared on in the complaint. But the court found that there was a warranty of the engine; that the drums furnished by appellant were of defective materials and workmanship; that respondents had been damaged in the sum of \$200 for freight on worthless drums, and \$500, the expense of the last drum, known as the "Portland" drum, and that the respondents had been damaged in the sum of \$2,000 for loss of profits. A decree was entered for respondents in the sum of \$1,348.80, being \$2,700, the amount of damages found in favor of respondents, less the amount found due on the notes, which was \$1,351.20.

A large number of errors are assigned by appellant, but they are all discussed under three heads, as follows: (1) What was the contract entered into by the parties? Did it include a warranty? (2) Was there any breach? (3) If there was a breach, what was the proper measure of damages? In regard to the contract, Mr. Clemmons, one of the respondents, testified as follows:

"I said to him [meaning Mr. Marconnier, secretary of the appellant company], I was in the logging business here in Chehalis county, and was in need of a large road engine, capable of hauling logs for a distance of 5,000 or 6,000 feet—at least 5,000; that I had at my camp a 10x12 Washington Iron Works engine, . . . but that the drum was not large enough to hold that amount of wire—the amount necessary to make that haul; that I had been advised by different parties to get one of their engines. I went there anyway. He said that they had a 10x15 engine—road engine—which would do the work satisfactorily for that long haul, and, of course, gave me points about it; the size shaft, drum, coil, etc. Mr. Marconnier told me they were making a 10x15 road engine that was just what I would want for that long haul, and especially adapted for that purpose, and I gave him the order for the engine. He told me how much wire the drum would hold, etc., the size of the wire, the different points about it, double friction, etc., and said they would like nothing better than to place that engine alongside of the Seattle engine 10x12."

Mr. Clemmons further testified that he thereupon went into the shop, and looked at the construction of one of the engines, and had about the same conversation there again. On cross-examination he was asked the following question:

"I ask you, Mr. Clemmons,—to go back to the time of the purchase of this engine,—if it is not a fact that at that time Mr. Marconnier told you that they would replace any defective parts in this engine on the cars at Tacoma free of cost to you, that broke, provided you would return the defective or broken parts, and that was the express understanding between you and them? Answer: There was some kind of a conversation like that; yes, sir."

Mr. Marconnier testified in reference to the contract as follows:

"Well, Mr. Clemmons came into the office, and I met him there. He stated he wanted a logging engine. I

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asked him what kind of an engine he wanted, and he said a 10x15 engine. I asked him if he knew the engines, and had seen them work. He said that he had. I said: 'Naturally the engine speaks for itself.' Of course, our aim was to make a good engine, and that if he purchased one of our engines, and, after using it and running it in camp, a casting should break or become defective, that we would replace said defective casting free of cost at our works, provided, however, that he return the defective parts to us, and free of cost to us."

Mr. Marconnier also testified that nothing was said about the haul of 5,000 or 6,000 feet, and that, after they had looked the engine over and agreed upon the terms, he dictated and Mr. Clemmons signed a contract as follows:

"Tacoma, Washington, March 29, 1900.

Puget Sound Iron & Steel Works,

Tacoma, Wash.

Gentlemen:—

You will please to enter order for one of your standard 10x15 road engines with large gear, and for which I agree to pay therefor the sum of \$2,500 as follows: \$100 cash with this order; \$735 when engine is ready for delivery; \$555 in three months from time of delivery; \$555 in six months from time of delivery; and \$555 in nine months from time of delivery. I agree to give notes for deferred payment to draw ten per cent. interest per annum until paid and secure said deferred payments by mortgage upon said engine. Said engine to be ready in about five weeks from the date hereof.

Yours truly,

C. H. Clemmons.

Address: Montesano.

Engine in Chehalis County.

Will notify when to ship."

Mr. Marconnier was corroborated by other witnesses to the effect that nothing was said about the length of the haul, and that there was no warranty that the engine would

do the work for which respondents were purchasing the same. The evidence shows, without dispute, that the drums broke without fault of respondents, and that other drums were furnished, without cost, by appellant on board the cars at Tacoma; that appellant did not require respondents to return any of the broken pieces, except probably one piece; and that the last drum was not furnished by appellant because of a strike of employees in appellant's shop. While there is some dispute in the evidence as to what the contract was, the weight of the evidence is clearly with the appellant, that there was no warranty that the engine would do the work which respondents were doing with it. The lower court was justified in finding from the evidence only that there was a warranty of the engine as being free from defects and imperfections. Counsel for appellant strenuously argue that the order for the engine as set out above is conclusive against warranty of any kind, and that the respondents can not be heard to say that there was any other agreement than that contained in the order. A number of authorities are cited to the effect that, where an article is sold by a formal written contract, which is silent on the subject of warranty, no oral warranty made at the time or previously can be shown, as the writing is conclusively presumed to embody the whole contract. But these cases are generally cases where the articles purchased are of a special known kind, and where there was a formal contract embodying all the terms and conditions of the agreement. But there is no such formal contract in this case. The contract here is simply an order for the engine, signed in the form of a letter by respondent C. H. Clemmons only. It does not purport to contain any part of the contract or conditions which the appellant was to perform. This court, in *Gor-*

don v. Parke & Lacy Machinery Co., 10 Wash. 18 (38 Pac. 755), stated the rule as follows:

"Where there have been collateral oral agreements, and the parties have not, by their written contract, appeared to intend to reduce their entire negotiation to written form, there are many cases sustaining the admission of parol evidence concerning the unwritten terms of such agreements. 17 Am. & Eng. Enc. Law, p. 443; *Pierce v. Woodward*, 6 Pick. 206; *Chapin v. Dobson*, 78 N. Y. 74 (34 Am. Rep. 512); *Willis v. Hulbert*, 117 Mass. 151; *Graffam v. Pierce*, 143 Mass. 386 (9 N. E. 819). But in all of the foregoing, as well as in many other cases which might be cited, the written contract itself was resorted to as the source of authority for receiving parol evidence; and this is the universal rule. 'The test of the completeness of the writing proposed as a contract is the writing itself. If this bears evidence of careful preparation, of a deliberate regard for the many questions which would naturally arise out of the subject matter of the contract, if it is reasonable to conclude from it that the parties have therein expressed their final intentions in regard to the matters within the scope of the writing, then it will be deemed a complete and unalterable exposition of such intentions. If, on the other hand, the writing shows its informality on its face, there will be no presumption that it contains all the terms of the contract.'"

Under this rule it is clear that parol evidence was admissible to prove a warranty in the case at bar.

2. Was there a breach of the warranty made? There is really no dispute in the evidence upon this question. Five drums broke within a short time. They all broke because of defects in manufacture. Flaws in the iron were discovered after the breaks. Four of these drums were furnished by appellant to respondents without cost, except the freight. When the fifth drum broke, appellant was not able to replace it because of a strike at its works, and

refused to do so on that account. This was certainly a breach of the agreement to supply defective parts.

3. What is the proper measure of damages? The general rule, as stated in 28 Am. & Eng. Enc. Law, p. 836, is as follows:

“Where the vendor makes the warranty in good faith, and not fraudulently, or with a knowledge that it is untrue, or likely to prove so, the measure of damages recoverable by the vendee is governed by the rule applying in other cases which involve nothing more than a mere breach of contract. This rule, as laid down in a leading case, and steadily adhered to ever since, is that ‘when two parties have made a contract which either of them has broken, the damages which the other ought to recover in respect to such breach of contract, should be either such as may fairly and reasonably be considered as arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may be reasonably supposed to have been in contemplation of both parties at the time they made the contract, as the probable result of a breach of it.’ The effect of this rule is to exclude the consideration of all remote and speculative damages, or those depending upon mere contingencies. It embraces two distinct classes of damages: First, those which are a natural and necessary result of the breach, and second, those which the parties may be supposed reasonably to have had in contemplation, when the sale was made, as a probable result of a breach.”

There is no claim in this case that the warranty was in bad faith, and we think the evidence fails to show that the warranty amounted to more than that the machine was a perfect one of its kind, and that any breaks or imperfections would be remedied by furnishing new parts free on board cars at Tacoma. We also think that loss of profits in logging, or on account of inability to carry on logging operations, could not reasonably have been in contempla-

tion of the parties at the time of the sale. There is no evidence at all in the record tending in any way to show that appellant knew the extent of respondents' operations, the number of logs he was hauling, the number of men or machines he was working, or the kind or character of roads the logs were hauled over. These things would certainly have been mentioned at the time of the contract if appellant intended to give a warranty that the engine would do the work which respondent was going to put it to, and, in case of failure, to be liable for the loss of profits of a large logging company.

The respondents rely upon the cases of *Skagit Ry. & L. Co. v. Cole*, 2 Wash. 57 (25 Pac. 1077), and *Graham v. McCoy*, 17 Wash. 63 (48 Pac. 780). In each of these cases, however, it was found that the party violating the contract either knew or must have contemplated the loss which necessarily followed his violation of the contract, and was therefore held liable for the profits. But, as we have seen above, the appellant here does not come within that rule. The court, following the advisory verdict of the jury, found damages in favor of respondents in the sum of \$2,700. The advisory verdict of the jury was as follows:

"We, the jury duly empaneled and sworn to try this cause, do make the following as our verdict and findings:

1. Defendants have been damaged in the difference between the price agreed to be paid for the engine and the value of the same as furnished defendants, in the sum of \$——.

2. On account of freight and other expenses in getting the extra drums from Tacoma into their camp, the sum of \$200.

3. On account of idle workmen, crew leaving, expenses of getting new crews together, the sum of \$——.

4. On account of the sixth or so-called Portland drum, the sum of \$500.

5. On account of loss on account of inability to put in logs, the sum of \$2,000.

J. M. Carter, Foreman."

The court also submitted special interrogatories to the jury, and the jury made findings thereon as follows:

"Q. Did any damages result from the breaking of the first drum? If so, how much? A. No. Q. Did any damages result from the breaking of the second drum? If so, how much? A. No. Q. Did any damages result from the breaking of the third drum? If so, how much? A. No. Q. Did any damages result from the breaking of the fourth drum? If so, how much? A. Yes. Q. Did any damages result from the breaking of the fifth drum? If so, how much? A. Yes."

There is practically no dispute in the evidence upon that part of the contract which related to replacing broken or defective parts of the engine. Nor was there any dispute that the freight and cost of replacing the drums was \$100 each. The jury, by the special verdicts, found that no damages resulted from the breaking of the first, second, and third drums. These special findings could have been made only upon the theory that the contract was that these extra drums were to be furnished free on the cars at Tacoma. They are in accord with the evidence upon that subject. There is no consistency in the finding that freight was to be paid on a part of the drums, and not on all, because there was no contention that there was any change in the terms of the contract in this respect. If respondents were entitled to recover for freight on one drum, they were entitled to recover on all. If they were not entitled to recover on the first, second, and third drums, they were not entitled to recover on any; and the special verdict, therefore, is in conflict with the finding of damages for freight

in the sum of \$200, and that finding must fail. The evidence shows that the "Portland" drum cost \$500. A part of this was freight from Portland. Respondents were entitled to have the cost of the drum at Portland, and the freight paid from Portland to Tacoma. There is nothing in the record to show that the cost of this drum at respondent's camp was more than it would have been at Tacoma. For this reason, we are not disposed to disturb this finding.

For the reasons above stated, the finding for \$2,000—being for loss of profits—must be set aside. For the reason that the damages proved do not amount to the admitted indebtedness owing by respondents to the appellant, the attorney's fee provided in the mortgage, viz., \$175, should be allowed.

The cause is reversed and remanded, with instructions to the lower court to enter a decree of foreclosure for the amount payable on the two notes sued on, together with \$175 attorney's fees and costs, less an offset of \$500. Appellant to recover costs on this appeal.

FULLERTON, C. J., and ANDERS and HADLEY, JJ., concur.

DUNBAR, J.—I dissent. I think the judgment should be sustained, under the rule announced in *Skagit Ry. & Lumber Co. v. Cole*, *supra*, and that the damages proven may reasonably be said to have been contemplated by the parties when the contract was made.

[No. 4672. Decided May 29, 1903.]

In the Matter of the J. C. WAUGH Disbarment Proceedings.

SUPREME COURT — JURISDICTION — DISBARMENT OF ATTORNEYS.

The supreme court has no jurisdiction of proceedings for the disbarment of an attorney, either under constitutional authority, or by virtue of its inherent powers, although the attorney may have perpetrated a fraud upon the superior court in gaining admission to practice (ANDERS, J., and FULLERTON, C. J., dissent).

Original Proceeding for Disbarment.

Thomas M. Vance, for petitioner.

Smith & Brawley and M. P. Hurd, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This is a disbarment proceeding, brought originally in this court against the respondent, based substantially upon the following allegations, namely: That at the time James C. Waugh applied for admission to the bar of the superior court of Skagit county, state of Washington, to wit, on December 1, 1890, he did not possess the qualifications requisite for admission to the bar, in that he was not a citizen of the United States, nor did he ever study law with an attorney in this state for the time required, nor did he possess a certificate from the supreme court of any other state or territory, nor had he ever been admitted to practice law in any other state or territory of the United States; that at the time he secured a certificate of admission to practice law in this state he concealed his disqualification, and thereby committed a fraud upon the court. A demurrer has been interposed to the petition, which raises the question of the jurisdiction of this court

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to entertain the petition and try the cause. It is contended by the relator that this court has inherent power to protect itself from fraud, and will exercise summary jurisdiction over its attorneys, who are in a sense officers of the court. The inherent power of a court is an undefined quantity and an undefinable term, and courts have indulged in more or less loose expressions concerning it. It must necessarily be that the court has inherent power to preserve its existence and to fully protect itself in the orderly administration of its business. Its inherent power will not carry it beyond this. The case *In re Lambuth*, 18 Wash. 478 (51 Pac. 1071), has been called to our attention as sustaining the contention that this court has jurisdiction in disbarment proceedings; and language was certainly used in that case which would tend to sustain this contention. But, outside of the fact that the disbarment proceeding was entertained by the court, what was said in that case was pure dictum, as the question of jurisdiction was neither discussed nor raised in the trial of the cause, but the cause was tried solely upon the merits; the defendant disavowing any intentions of offense or disrespect, and asking to strike the offensive language from the petition for rehearing which was the subject of the contempt proceedings. In that case, however, the contemptuous act was directed to this court, and the language used had a tendency to bring the court directly into contempt and impair its usefulness, so that in any event the case would not be a case in point here. Ordinarily a court can enforce adequate protection from the wrongful acts of attorneys by imposing upon them the penalties prescribed by the law for a breach of duty due to the court, and if this can be accomplished under the law there is no necessity to resort to inherent power. But the questions discussed in *In*

re Lambuth, supra, are really not involved in this case. This is not a proceeding for contempt of this court, and it is not necessary to determine in this action whether, in an action against a defendant for such contempt, it would be necessary for the court to go outside of the remedy provided by law and draw on its inherent power to protect its dignity and preserve its usefulness; for the defendant is not charged with contempt of this court, or with any action which would in any way reflect on this court or interfere with the transaction of its business. But he is charged with committing a fraud upon the superior court of Skagit county, the court which, under the provisions of the law then in existence, admitted him to practice; and while, in a limited sense, all courts, in common with society, are affected by the moral plane on which the attorneys of the state stand, the fraud practiced upon this court by gaining admission upon a certificate obtained by fraud is not such an assault on this court, in our opinion, as would warrant it in usurping the jurisdiction of the superior court upon the theory of inherent power. This court is a creature of the law, and, outside of the necessity which we have mentioned above, cannot possess any inherent power to exercise original jurisdiction which is exclusively conferred by law upon another tribunal. And original jurisdiction in this kind of a case is especially conferred upon the superior court by both the fundamental and statutory law, and, while the jurisdiction is not made exclusive in terms, the whole tenor of the section of the article of the constitution in relation to original jurisdiction plainly indicates that it is the intention to bestow, not only original jurisdiction, but original exclusive jurisdiction, upon the superior court in the cases therein specified. The same may be said of the statutory, as well as of the

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constitutional, provision. Section 4 of article 4 of the state constitution provides, that the supreme court shall have original jurisdiction in habeas corpus and quo warranto and mandamus as to all state officers. The same section provides that the supreme court shall have power to issue writs of mandamus, review, prohibition, habeas corpus, certiorari, and all other writs necessary and proper to the complete exercise of its appellate and revisory jurisdiction; and under any well-known rule of construction its original jurisdiction would be confined to the cases specified, and especially construed in connection with § 6 of the same article, which provides that the superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, and in numerous other cases mentioned, and then provides that it shall have original jurisdiction in such special cases and proceedings as are not otherwise provided for, and that it shall have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court. And as was said by this court in *State ex rel. Kantoor v. Superior Court*, 15 Wash. 668 (47 Pac. 31, 37 L. R. A. 111, 55 Am. St. Rep. 907), after quoting the above constitutional provisions:

"It thus appears that the jurisdiction of the supreme court and of the superior courts of this state is expressly defined by the constitution, and reference must therefore be had to that instrument in order to determine the question of jurisdiction in any particular case."

Sections 4650 and 4663 of Ballinger's Code enact substantially the provisions of the constitution above referred to. Some suggestions have been made that by reason of the fact that the law confers the power of admission on this court, it necessarily follows that the power to disbar is

conferred; but we are unable to see the force of these suggestions, for, outside of the fact that the legislature would be powerless to confer original jurisdiction in one court when the constitution vested it exclusively in another, many rights are decreed by courts which may be modified by other courts. Outside of constitutional limitations, the legislature certainly has a right to prescribe the qualifications of attorneys. It may prescribe one forum to admit under such qualifications and another to disbar for reasons satisfactory to the legislative mind. In that respect, in the absence of constitutional limitation, the legislative will is absolute. But it has not undertaken to interfere with the original jurisdiction conferred by the constitution on the superior court. It has simply clothed this court with power of admission, and has been content to stop there, properly leaving the jurisdiction in disbarment where it is vested by preceding laws and by the constitution. Under the provisions of the law passed by the last legislature, the real determination of the qualifications of applicants for admission to the bar, in case of persons graduating from the law department of the state university of Washington, is vested in the faculty and the trustees of that institution; the duty of this court being purely perfunctory, certain general qualifications being shown, showing that in the legislative mind the order of the admission to the bar is not regarded as a strictly judicial proceeding. And the same may be said with relation to the admission of attorneys to practice law by an examination and judgment of the superior court under the law in existence at the time of the admission of the defendant in this case, and under the provisions of which laws an applicant was entitled to practice in this court upon exhibiting a certificate by virtue of his admission in the su-

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perior court. Whether this action be considered a criminal or a quasi criminal action, as it is held to be in some jurisdictions, or a civil action, involving a property right, as was indicated by this court in *State ex rel. Rohde v. Sachs*, 2 Wash. 373 (26 Pac. 865, 26 Am. St. Rep. 857), the respondent has a right to have his cause tried by the superior court and reviewed by this court on appeal. This is in harmony with both the letter and the spirit of the law, which created one court a trial court with original jurisdiction, and the other, with certain specified exceptions, a court of appellate jurisdiction.

The demurrer is sustained.

MOUNT and HADLEY, JJ., concur.

ANDERS, J. (dissenting)—The sole question presented for determination in this proceeding is whether this court has jurisdiction, in the first instance, to disbar attorneys who have been admitted to the bar of this state.

The majority of the court has determined that it has not such jurisdiction, but I am constrained to dissent from that conclusion.

It is true that the jurisdiction of the supreme court and superior courts of this state is defined by the constitution. And it is also true that original and exclusive jurisdiction of disbarment proceedings is not vested in the superior courts by any express provision of the constitution; and I do not think that it ought to be announced as the law of this state, that such exclusive jurisdiction must necessarily be inferred from the general provisions of that instrument, mentioned in the majority opinion. Long prior to the adoption of our constitution, it was the settled rule that all courts of general or superior jurisdiction are vested with certain necessary and inherent powers, among which is the power of controlling their own officers. And, in my

opinion, it should not be assumed that the framers of our constitution intended to create a supreme court in and for the state of Washington, which should not possess those powers which are necessary for the protection of the court itself and the proper administration of justice, and which have hitherto been universally considered as inseparable from such courts. It seems to be conceded in the prevailing opinion that this court has power to punish attorneys for contempt. And, if that be true,—and I have no doubt that it is,—it is by reason of the court's inherent power, and not by virtue of any provision of the constitution of the state. The object and purpose of a contempt proceeding is punishment; but the purpose of a proceeding to disbar an attorney is not punishment, within the ordinary meaning of that word, but simply to rid the profession of an unworthy member, and the court of an unfit officer. But the power to accomplish the one or the other of those purposes is not derived from legislative enactments or constitutional provisions. Its origin is necessity and is, therefore, inherent in the court. Says a learned author:

“The power to strike from the rolls is inherent in the court itself. . . . Statutes and rules may regulate the power, but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients. And where certain grounds are specified by the statute, this does not necessarily exclude striking from the rolls for causes not specified. A statute is not to be construed as restrictive of the general powers of the court over its officers.” Weeks, Attorneys (2d ed.), pp. 154-155.

And Judge Works, in his valuable treatise on Courts and Their Jurisdiction, at § 27, p. 170, observes:

“All courts of general and superior jurisdiction are possessed of certain inherent powers not conferred upon

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them by express provisions of law, but which are necessary to their existence and the proper discharge of the duties imposed upon them by law. Of these inherent powers, the following may be enumerated: . . . to suspend or disbar attorneys, or strike their names from the rolls."

As to the power of appellate courts in cases such as the one at bar, that author, in § 21, p. 98 of his work, above cited, lays down the law as follows:

"A court may be vested with both original and appellate jurisdiction, and courts whose jurisdiction is essentially and so far as their express authority is concerned entirely appellate, are possessed of certain inherent and incidental powers, which belong to every court of general or superior jurisdiction, whether its jurisdiction be original or appellate."

And it seems to me that the above quotation constitutes a very clear and correct statement of the law upon the subject under consideration, as announced by the courts of last resort throughout this country.

That appellate courts habitually and unhesitatingly assume jurisdiction to strike the names of attorneys from the rolls, or to suspend them from practice, for unprofessional conduct, is evidenced by the following cases: *In re Whitehead*, 28 Ch. Div. 614; *Penobscot Bar v. Kimball*, 64 Me. 140; *People ex rel. Elliott v. Green*, 7 Colo. 237 (3 Pac. 65, 374, 49 Am. Rep. 351); *In re Wellcome*, 23 Mont. 140 (58 Pac. 45); *State ex rel. Benton v. Baum*, 14 Mont. 12 (35 Pac. 108); *In re Badger* (Ida.), 35 Pac. 839; *In re Kowalsky* (Cal.), 35 Pac. 77; *In re Tyler*, 78 Cal. 307 (20 Pac. 674, 12 Am. St. Rep. 55); *Dean v. Stone*, 2 Okl. 13 (35 Pac. 578); *In re O———*, 73 Wis. 602 (42 N. W. 221).

See, also, 3 Am. & Eng. Enc. Law (2d ed.) and 4 Cyc., title, "Attorney and Client."

Although no statute is necessary to authorize this court to entertain a proceeding of this character, the legislature has, nevertheless, provided that an attorney and counselor may be removed or suspended by *any court of record* of the state for certain specified causes, and that, in all cases of removal or suspension by a superior court, the judgment or order of removal or suspension may be reviewed on appeal by the supreme court. Bal. Code, § 4775. And a proceeding to remove or suspend an attorney may be taken by the court of its own motion, for matter within its own knowledge, or upon the information of another, and in either case the party has the privilege of making his defense. Bal. Code, § 4776. "Such proceedings shall be by motion and answer, and evidence may be examined on either side." Bal. Code, § 4777.

While these legislative declarations as to the power of courts of record to remove or suspend members of the bar do not, as I have endeavored to show, create such power, still they are entitled to respectful consideration as expressions of the will of the law-making body of the state upon a question of vast importance to the courts, to the legal profession, and to the public. But, so far as the procedure is concerned, the statute is mandatory; for that is a matter within the exclusive province of the legislature.

In *In re Lambuth*, 18 Wash. 478 (51 Pac. 1071), which was a proceeding to disbar an attorney, and which was instituted by the attorney general at the instance of the court itself, this court exercised what it then understood to be one of its inherent powers, and declared the law, in its opinion, in language almost identical with that quoted above from Weeks on Attorneys. It is now said,

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Syllabus.

in effect, however, that the question of jurisdiction was not presented or passed upon in that proceeding, and that all that was there said by the court relative to its inherent power was purely *dictum*. But, however that may be, I think it can safely be said that the doctrine announced in the *Lambuth Case* has been generally, if not universally, recognized and acted upon by the courts from the time of King Henry IV down to the present day. See Weeks on Attorneys, § 80; *Bradley v. Fisher*, 13 Wall. 335. Attorneys are everywhere considered as officers of the court, and in this state they are required by statute, when admitted to practice, to file an official oath.

And it has heretofore been generally conceded, as a matter of course, that all courts of record have inherent power to control the conduct of and to suspend or remove such officers. But this usual and salutary rule, I regret to say, is abrogated by the decision in this case, and this court will hereafter be powerless to remove or suspend an attorney for just cause, without the interposition and assistance of the superior court. I think the demurrer should be overruled.

FULLERTON, C. J., concurs in dissenting opinion.

[No. 4566. Decided June 11, 1903.]

THE STATE OF WASHINGTON *on the Relation of Stephen Land, Appellant*, v. DAVID CHRISTOPHER *et al.*, Respondents.

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY.

Where the subject-matter of a controversy has ceased prior to judgment, by reason of the performance on the part of defendants of duties or obligations which the action was brought to de-

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termine, no appeal will lie from such judgment merely for the purpose of determining the question of costs.

Appeal from Superior Court, Clallam County.—Hon. GEORGE C. HATCH, Judge. Appeal dismissed.

A. A. Richardson, for appellant.

McClinton & McClinton, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This was an application by appellant for a writ of mandate to compel the respondents, as county commissioners of Clallam county, to canvass the returns of an election for road supervisor in road district No. 48 in said county. The superior court issued an alternative writ in the usual form, in accordance with the affidavit and motion of the appellant. The respondents interposed a demurrer to the affidavit and alternative writ on several grounds, which demurrer was by the court sustained. The relator elected to stand upon his affidavit and writ, and the trial court thereupon dismissed the proceeding at the cost of the relator. From that judgment the relator appealed.

The respondents move this court to dismiss this cause, and to affirm the judgment of the superior court, upon the grounds (1) that this court has no jurisdiction to render judgment in this particular cause, for the reason that there is no actual controversy involving any real or substantial rights between appellant and the respondents, and no subject-matter upon which any judgment of the supreme court can operate; and (2) that no actual controversy involving any real or substantial rights between the parties to this cause exists, or did exist herein at the time of the making and giving of the judgment of the superior court from which this appeal is prosecuted. This motion is well taken, and must therefore be sustained.

It is disclosed by the record herein that on November 13, 1902, and six days before the judgment complained of was rendered, the board of county commissioners, being then in regular session, duly canvassed the returns of the election for road supervisor held in road district No. 48 in said county on October 11, 1902, and did then and there find and declare that the appellant, Stephen Land, was elected supervisor of said road district at said election, and did then and there authorize and direct the auditor of said county to issue to the appellant a certificate of his election; that on November 13, 1902, and after the said election returns had been so canvassed, and while the said board was still in session, counsel for appellant was informed of said proceedings and the result thereof, and knew at the time of the dismissal of appellant's action, and also at the time the notice of appeal herein was served, that the said board of commissioners had canvassed the returns of said election, and had declared the appellant duly elected such road supervisor, and had ordered a certificate of election to be issued to him; that said certificate of election was duly issued to appellant on November 26, 1902, and that thereafter, on December 13, 1902, appellant duly qualified as such supervisor, by giving bond and filing the oath of office, as required by law.

It thus appears that the object of this proceeding had been attained, even before the judgment of the court below was rendered, and that there is now no real controversy existing in this cause, and therefore nothing to be determined by this court. And in such cases this court has frequently and uniformly held that a motion to dismiss the appeal must be granted. *State ex rel. Coiner v. Wickersham*, 16 Wash. 161 (47 Pac. 421); *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424); *State ex rel. Daniels v. Prosser*,

16 Wash. 608 (48 Pac. 262); *State ex rel. Mortgage Co. v. Meacham*, 17 Wash. 429 (50 Pac. 52); *Watson v. Merkle*, 21 Wash. 635 (59 Pac. 484); *Sether v. Clark*, 24 Wash. 16 (63 Pac. 1106); *State ex rel. Taylor v. Cummings*, 27 Wash. 316 (67 Pac. 565). In *State ex rel. Mortgage Co. v. Meacham*, *supra*, this court said:

“Courts will not hear and determine abstract questions of law; neither can this court permit a mere question of costs in a cause to be litigated here.”

The appeal is dismissed and the judgment affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR and MOUNT, JJ., concur.

[No. 4699. Decided June 13, 1903.]

CITY OF SPRAGUE, *Appellant*, v. THOMAS F. MEAGHER,
Respondent.

APPEAL — STATEMENT OF FACTS — LACK OF CERTIFICATION — DENIAL
OF AMENDMENT.

Where a purported statement of facts on appeal is not certified by the trial judge, and the record fails to show that it had ever been settled, or application made therefor, or notice of the time and place of settlement given to respondent, the statement will not be returned to the trial judge for certification, but will be stricken from the files.

SAME — STRIKING STATEMENT OF FACTS — AFFIRMANCE OF JUDGMENT.

Where the statement of facts on appeal has been stricken, and there are no assignments of error in appellant's brief, other than those based upon the evidence and proceedings at the trial, the respondent is entitled to an affirmance of the judgment on dismissal of the appeal.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Appeal dismissed.

June 1903.]

Opinion Per Curiam.

Samuel R. Stern, for appellant.*Myers & Warren*, for respondent.

PER CURIAM.—The respondent moves to strike from the files the purported statement of facts filed by the appellant in this court, for the reason that the same has never been certified by the judge who tried said cause, as required by law, nor at all, and moves for an affirmance of judgment for the reason that all the alleged errors are based upon the evidence and proceedings at the trial, as shown by the purported statement of facts. This motion must be granted.

An examination of the record shows that there is no certificate of the judge whatever to the statement of facts. After the filing of this motion by the respondent, the appellant asks the return of the statement of facts to the judge who tried the cause, for the purpose of having said judge append his signature to a prepared certificate of the statement of facts. But under the circumstances of this cause this cannot be done, as it does not appear from the record that the statement of facts was ever settled by the trial judge, or that there has been any application to settle the statement of facts, or any notice of the time or place given for such settlement to the respondent, who, the record shows, had proposed amendments to the statement of facts prepared by the appellant. Under all the circumstances of this case, there is nothing left for this court to do but to strike the statement.

The further motion for the affirmance of judgment must also be granted, as no issue is presented for determination by this court, outside of those presented by the alleged statement of facts. The appellant contends that there is a question raised upon the pleadings, and that judgment should not have been entered against it in this case, for the

reason that some of the allegations of the reply had not been denied; but, outside of the fact that the statute provides that the allegations of the reply shall be deemed denied, there is no assignment of error in appellant's brief which raises this question.

The cause will therefore be dismissed.

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[No. 4630. Decided June 15, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. EMMETT
MITCHELL, *Appellant*.

CRIMINAL LAW — FAILURE OF ACCUSED TO TESTIFY — DUTY OF COURT
TO INSTRUCT AGAINST INFERENCE OF GUILT.

An instruction that the neglect of defendant to testify should not create any presumption against him was a sufficient compliance with the requirements of Bal. Code, § 6941, which provides "that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf."

SAME — INSTRUCTIONS — COMMENT ON FACTS.

An instruction of the court, stating the theory of one of the parties to the prosecution, and applying the law thereto, in case the jury shall find in accordance with such theory, is not objectionable as being a comment on the facts within the meaning of art. 4, § 16, of the constitution.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Graves & Engchart, for appellant.

H. D. Cooley, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was convicted of the crime of robbery, and was sentenced to a term of twenty years

in the penitentiary. The first assignment is that the court erred in failing to charge the jury that no inference of guilt shall arise against the accused by reason of his failure or refusal to testify as a witness in his own behalf. If this assignment were true in fact, it would constitute reversible error under the decisions of this court in *Linbeck v. State*, 1 Wash. 336 (25 Pac. 452); *State v. Myers*, 8 Wash. 177 (35 Pac. 580). But on that point the court instructs as follows:

"The court instructs the jury that, while the statutes of this state provide that a prisoner charged with a crime may testify in his own behalf, he is under no obligation to do so and the statute expressly declares that his neglect to testify shall not create any presumption against him."

Section 6941 of Ballinger's Code, provides "That it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf." We think the court's instruction was a substantial compliance with the provisions of the statute. No particular form of words is required or can be placed in the mouth of the judge. It is the substance of things which the law regards, and it will disregard mere formalities of expression. The judge is simply the mouthpiece of the law, and the weight which the jury attaches to the instructions of the court is and should be based upon the belief of the jury that the instructions of the court are an enunciation of the law; and when the court says to the jury that no inference of guilt shall arise against the accused under certain conditions he does not say any more in substance, or protect the rights guarantied to the prisoner by the law any more, than when he tells them that the law of the state provides that no inference of guilt shall arise against the accused, if he shall fail or refuse to tes-

tify in his or her own behalf. We think the criticism is hypercritical, and that the rights of the appellant in respect to the instruction were fully protected.

It is contended that the following instruction, namely:

“You are further instructed that it is not necessary to constitute the stealing or carrying away from the immediate presence of the deceased that it should have been done, if done, in his immediate view, where he could see it done, and if you find from the evidence beyond a reasonable doubt that he had made a violent assault upon the deceased by choking him and causing him to fall upon the ground and that he then took from his pockets the sum of money as charged in the information, then you will find the defendant guilty of robbery as charged in the information,” constitutes error, as being in conflict with art. 4, § 16 of the state constitution, which provides that “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” We do not think that this instruction falls under the ban of the constitution. It is the duty of the court to apply the law to the respective theories of the state and the defendant. While the court would go beyond its province in a discussion of the testimony which would indicate to the jury what weight the court attached to such testimony, yet it may tell the jury, that if it finds certain facts from the testimony, what the law is applicable to such facts, providing, always, of course, that such instruction must be confined to testimony given in the case; and we think, from an examination of the record in this case, that there is sufficient evidence to support the theory of the state as announced by the judge. It certainly was not an actual comment on the testimony, indicating to the jury what the opinion of the court was upon the testimony; and if it

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was simply an erroneous instruction, or one which was not pertinent, and which was calculated to mislead the jury, it was error which could only be corrected by an exception properly saved, and there was no exception to the instruction given. We think there was sufficient evidence to sustain the verdict, and we are not inclined to interfere with the province of the jury in that respect. Nor are we prepared to say that the court abused its discretion in imposing the penalty which it did.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4707. Decided June 18, 1903.]

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THE STATE OF WASHINGTON *on the Relation of William D. Fetterley* v. ARTHUR E. GRIFFIN, *Judge of the Superior Court of King County.*

APPEAL — SETTLEMENT OF STATEMENT OF FACTS — WAIVER OF RIGHT TO PROPOSE AMENDMENTS — EFFECT.

The settlement and certification of a proposed statement of facts, upon the waiver by the adverse party of his right to propose amendments, ousts the court, in the absence of fraud, of further jurisdiction over the matter, even though objection is raised to the statement before the expiration of the ten days allowed by statute for the submission of amendments after the filing of the proposed statement.

Original Application for Prohibition.

Solon T. Williams, for relator.

W. T. Scott, Elmer E. Todd and Herman W. Craven, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is an original application in this court for a writ of prohibition directed to the superior court of King county, and to the Honorable Arthur E. Griffin, one of the judges thereof. The affidavit in support of the application substantially recites the following facts, to wit: That on the 2d day of March, 1903, there was pending in said superior court a certain cause, wherein the state of Washington was plaintiff and the relator was defendant; that the cause was tried before the above-named judge of said court and a jury, and that on said date the jury returned into court a verdict of guilty as charged; that thereafter, on the 13th day of March, 1903, the said court, after overruling a motion for a new trial, duly sentenced the relator to serve a term of fifteen years' imprisonment in the state penitentiary; that within ten days from said date the relator duly appealed from said judgment to this court, and within thirty days, to wit, on the 8th day of April, 1903, he caused to be filed and served a proposed statement of facts in said cause; that thereafter, on the 11th day of April, 1903, the said plaintiff, by its attorney, in open court duly waived the ten days allowed by law for proposing amendments to said statement of facts, and consented that the proposed statement so filed and served by relator's attorney should be settled, certified, and signed by said court as and for the statement of facts in said cause; that no proposed amendments to said statement of facts have ever been filed or served; that thereafter, on said 11th day of April, 1903, the said judge did settle, certify, and sign said proposed statement of facts as and for the statement of facts in said cause, and did certify that the matters and proceedings embodied therein were matters and proceed-

June 1903.] Opinion of the Court.—HADLEY, J.

ings occurring in said cause; that the same was thereby made a part of the record therein, and that said statement contained all the material facts, matters, and proceedings theretofore occurring in said cause and not already a part of the record therein; that thereafter, and on said 11th day of April, 1903, the state of Washington, plaintiff in said cause, served upon this relator, the defendant therein, and filed in said court, a motion as follows:

"Comes now W. T. Scott, the prosecuting attorney of the county of King, state of Washington, and moves the court for an order herein vacating and setting aside the certificate to the statement of facts heretofore signed in said cause on the 11th day of April, 1903, which said statement of facts was proposed by the defendant in the above-entitled cause, for the reason that said purported statement of facts purports to contain matters not occurring at the trial of said cause, and does not contain all the material matters and proceedings in said cause, nor all the evidence and testimony taken at the trial of said cause. This motion is based on the files of said cause, and the minutes of the proceedings on the trial thereof, and the affidavits of Elmer E. Todd and S. H. Furber hereto attached."

That thereafter, on the 25th day of April, 1903, the relator, by his attorney, duly objected to the consideration of said motion by the said judge, for the reason that neither said respondent, as such judge, nor said superior court of King county, had jurisdiction to entertain said motion, which objection was by said judge overruled, to which ruling the relator duly excepted; that the hearing upon said motion was by repeated adjournments continued until the 9th day of May, 1903, and that the respondent threatened to and would, unless prohibited by this court, proceed on said date to the consideration of said motion, and would then vacate and set aside said certificate of said statement of facts; that no charge of deceit, fraud, or mis-

representation is made as a basis for said motion. Upon the above recital of facts an alternative writ of prohibition was issued by this court, directed to the said judge and to said court, commanding that further proceedings shall not be had upon the consideration of said motion until the further order of this court, and also commanding the said judge to show cause why he shall not be absolutely prohibited from any further proceedings in such matter.

To the alternative writ the respondent answered that, when the said statement of facts was certified by him, the state of Washington was not present in court by attorney or otherwise, but through one of its attorneys it had informed the clerk in department No. 2 of said court, in which department the respondent is the presiding judge, that it consented that said statement of facts proposed by relator should be certified; that on the same day the aforesaid motion to vacate and set aside the certificate was served and filed, and in support thereof certain affidavits were also served and filed. Copies of the affidavit are attached to the answer, and that of Elmer E. Todd is to the effect that the statement of facts proposed by relator purported upon its face to be a full and complete record of all the proceedings and matters occurring on the trial of said cause; that he was not present at the trial of the cause, and he inquired of Mr. Furber, who, as stenographer, reported the trial, whether the relator's attorney had procured from said Furber a complete statement of facts from the minutes of proceedings as reported by said Furber; that said Furber told him he had done so; that he, having no reason to believe the statement proposed by relator was other than what it purported to be, consented to its being signed on April 11, 1903; that about an hour thereafter he showed a copy of said statement to said Fur-

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ber, who informed him that the statement was not the one prepared by him (Furber), whereupon he at once proceeded to the office of relator's attorney, and informed said attorney that he could not consent to the certifying of the said proposed statement, and, upon learning from said attorney that it had already been certified, he proceeded at once to the courthouse, and asked the court to set aside said certificate, and the court thereupon informed him that he would take the matter up only when relator's attorney was present. The affidavit of S. H. Furber is to the effect that the statement he prepared was a complete and correct report of the proceedings on the trial of said cause, and that the statement proposed by relator is not the one prepared by said Furber, but that it has been changed by omitting certain portions. The portions alleged to have been omitted are specifically set out. The affidavits of Vince H. Faben and B. F. Stuart are to the effect that certain omissions were made in the proposed statement. The answer of respondent proceeds to say that leave was given to file said affidavits, over the objection of relator; that he has not heard and decided said motion upon its merits, but that if the facts are as set out in the affidavits filed in support of the motion, and if it further appears that the state of Washington through its attorney's mistake or inadvertence consented that the statement proposed by relator be certified by the respondent as judge, and if it further appears that such statement contains facts and matters which did not occur in said cause, and does not contain all the material matters and proceedings which did occur therein, the respondent as such judge desires to grant said motion and set aside said certificate.

The foregoing is a substantial statement of the issues upon which a hearing was had in this court. It is not de-

nied that the proposed statement was regularly filed and served, and that three days thereafter the state, through its attorney, consented that the statement proposed should be settled, certified, and signed. The state was under no compulsion to waive the statutory ten days within which it might file and serve proposed amendments to the statement, a right expressly granted to it by § 5058, Bal. Code. It did, however, waive the time, and also the right to file and serve proposed amendments. There is no showing that relator's counsel intentionally deceived the attorneys for the state by a misrepresentation of any facts, or that he indulged in any fraudulent scheme to mislead them. The proposed statement was openly filed and served, and it was for the state's counsel to examine the same and determine whether any amendments were desired. Although it may be a common custom, yet it was not compulsory that relator's counsel should file and serve the identical typewritten manuscript which was handed him by the stenographer. Such manuscript could be used by him in the preparation of what he intended to propose as a statement of facts, and he then had a perfect right to file and serve such proposed statement. It is not impossible for counsel to honestly believe that errors appear in the transcribed notes of a stenographer, and in that event he has a right to correct such errors in accordance with what he believes the facts to be, and may present his statement so corrected, leaving it to opposing counsel to offer amendments if the statement does not conform to his understanding of the facts. In such event the court must determine what the disputed facts are, and in most cases will doubtless be governed by the stenographer's notes. But it is not impossible that even court and counsel may clearly believe them to be otherwise. The state had the opportunity to examine this proposed statement and determine upon

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its sufficiency. In law it must be presumed to have done so, in the absence of actual fraud by the relator, and to have found no objection to it by reason of having waived time and the right to propose amendments. The waiving of time to propose amendments, and the consent of the state that the statement be signed without amendments, became as binding upon it as if ten days had elapsed with no amendments proposed, in which latter case it would, under the statute, have been "deemed agreed to," and should have been certified by the judge. The statement was therefore regularly settled and certified. In *State ex rel. Hersner v. Arthur*, 7 Wash. 358 (35 Pac. 120), this court declared that a statement of facts can only be settled in the manner prescribed by statute, and that a judge can only certify a statement in accordance with the direction of the statute. It was also declared that when no amendments are proposed, the statement being "deemed agreed to," the judge has no duty of investigation imposed upon him, and shall certify the statement as proposed. Under the stipulation of counsel for the state the certificate in question here must be held to have been made under like circumstances. It is of equal and binding force as though made after ten days, with no amendments proposed. In either case the statement becomes a part of the record, and the respondent in an appeal is thereafter precluded from moving for its correction. For the foregoing reasons it must be held that the superior court cannot now entertain the motion against which relief is here sought.

Let the writ issue.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 43264. Decided June 20, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. JOSEPH
PRIEST, *Appellant*.

RAPE — INFORMATION — CRIME CHARGED — DUPLICITY.

An information charging that defendant committed the crime of rape by feloniously making an assault upon a female child of the age of fourteen years, and that he did then and there feloniously ravish, carnally know and abuse her does not charge more than one crime, but sufficiently charges the crime under that subdivision of Bal. Code, § 7062, which provides that a person shall be guilty of rape who shall carnally know any female child under the age of eighteen years.

CRIMINAL LAW — ARGUMENT OF COUNSEL — DISPUTE OVER EVIDENCE —
MISTAKE OF COURT — REFUSAL TO CORRECT.

Where counsel for the state and for the defense dispute one another's statements in their argument to the jury as to whether a certain material and relevant fact was in evidence, and the court waves the dispute aside with the remark that there is no such testimony in the case, and refuses to instruct the jury otherwise when the court is shown by the stenographer's notes to be mistaken, the action of the court constitutes reversible error.

Appeal from Superior Court, Jefferson County.—Hon.
GEORGE C. HATCH, Judge. Reversed.

Trumbull & Trumbull, for appellant:

It is apparent that the information charged a forcible or common-law rape; but it also charges that the appellant did feloniously make an assault and carnally know and abuse a female child under the age of eighteen, which is the statutory or constructive rape. Therefore the information charges the commission of a rape by force and against the consent of the female, and also the statutory rape, where the element of force is immaterial. Such an information is duplicitous. *State v. Lee*, 56 Pac. 415; *Greer v. State*, 50 Ind. 267 (19 Am. Rep. 709); *Vasser*

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Argument of Counsel.

v. State, 55 Ala. 264; *People v. Williams*, 65 Pac. 323; *People v. Castro*, 65 Pac. 13.

Judges must take great care to say nothing in the hearing of jurors, while the case is progressing, which can possibly be construed to the prejudice of either party. *Cronkhite v. Dickerson*, 51 Mich. 177; *Atchison, T. & S. F. Ry. Co. v. Ayers*, 42 Pac. 722; *Howland v. Oakland Con. St. Ry. Co.*, 47 Pac. 255; *State v. Stowell*, 60 Iowa, 535 (15 N. W. 417); *Kirk v. Territory*, 60 Pac. 797; *State v. Clements*, 14 Pac. 410; *Cohen v. Drake*, 13 Wash. 102; *State v. Crotts*, 22 Wash. 245; *State v. Coella*, 3 Wash. 99; *Sullivan v. People*, 31 Mich. 1; *Wheeler v. Wallace*, 53 Mich. 355. The rule is well settled that, where the judge during the progress of the trial makes remarks in the presence of the jury which would be erroneous and prejudicial if they had been embodied in the formal charge, the losing party will be entitled to have a verdict to which they might have contributed set aside. *Shakman v. Potter*, 98 Iowa, 66; *State v. Philpot*, 97 Iowa, 365; *Sharp v. State*, 51 Ark. 147; *State v. Harkin*, 7 Nev. 377; *State v. Jacob*, 30 S. C. 131; *Valley Lumber Co. v. Smith*, 71 Wis. 304; *Cross v. Tyrone Mining Co.*, 121 Pa. St. 387.

George H. Clementson, Prosecuting Attorney (*J. E. Cochran* and *James G. McClinton*, of counsel), for the State:

The allegation "feloniously did ravish", in charging statutory rape on a female child, is but surplusage, and must be so treated. *State v. Miller*, 3 Wash. 134; *State v. Ackles*, 8 Wash. 462; *State v. Abrams*, 11 Ore. 169 (8 Pac. 327); *State v. Tom Louey*, 11 Ore. 326 (8 Pac. 353); *State v. Horne*, 20 Ore. 485 (26 Pac. 665). It is language of ordinary and very general use in charging

the crime of statutory rape on a child. *State v. Elwood*, 15 Wash. 453; *State v. Hulbert*, 14 Wash. 307; *State v. Hunter*, 18 Wash. 672.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was convicted of the crime of rape. The charging part of the information was as follows:

“Joseph Priest, the defendant above named, is hereby accused by George H. Clementson, as prosecuting attorney for Clallam county, in the state of Washington, by this information, of the crime of rape, committed as follows: The said Joseph Priest, the defendant above named, on or about the third day of July, A. D. 1901, in the county of Clallam, in the state aforesaid, then and there being, in and upon one Edith Trickel, a female child under the age of eighteen years, to wit, of the age of fourteen years, feloniously did make an assault and her the said Edith Trickel, then and there feloniously did ravish, carnally know and abuse.”

A demurrer was interposed to the information and the overruling of the demurrer is the first error assigned; the contention being that the information is bad on account of duplicity, that it charged more than one crime, that the appellant was not notified by the information as to the particular crime charged, and that he was unable to determine from the information whether he was charged with forcible or the common-law rape, or with rape under the statute. But any one of the crimes is a statutory crime. The statute provides three definitions of this crime, and § 7062, Bal. Code, provides that “a person shall be deemed guilty of rape who (1) shall, by force and against her will, ravish and carnally know any female of the age of eighteen years or more; (2) shall, by deceit, deception, imposition or fraud induce a female to submit

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to sexual intercourse; (3) shall carnally know any female child under the age of eighteen years." So that the element of force must necessarily enter into the first definition, and that of deceit, deception, imposition or fraud into the second. The information in this instance does not charge any force; neither does it charge any deceit, deception, imposition or fraud, but falls squarely within the third subdivision of the section, viz., carnal knowledge of a female child under the age of eighteen years. We think the appellant was abundantly notified of the crime with which he was charged, and that no error was committed in overruling the demurrer to the information.

After the state had made its opening argument to the jury, counsel for the defendant stated, in reference to the waist of the complaining witness (which was an exhibit in the case, and had been introduced by the state for the purpose of showing that there had been a struggle, and that the alleged rape was with actual force and violence, there being tears and rips in the waist which were alleged to have been caused by force and violence during the alleged struggle), that the prosecuting witness had stated in her testimony that at the time of the struggle she had a jacket or coat on over the waist; and argued that if the underwaist was torn in the supposed struggle, it was not unreasonable to suppose that the jacket would also be torn, if the conflict was as described by the prosecuting witness, and asked why this jacket was not presented by the state. This statement of the counsel for the defense was disputed by one of the counsel for the state in the closing argument, who said that Mr. Trumbull was mistaken in regard to the prosecuting witness wearing a jacket or coat at the time of the alleged violence, and that there was not a particle of evidence to substantiate his (Trumbull's) state-

ment. Thereupon Mr. Trumbull, for the defendant, objected to the statement of counsel, and reiterated that the prosecuting witness had so testified that she wore a coat or jacket at that time. The court then interposed the following remark: "Do you want me to decide this question? If you do, I can decide it." Mr. Trumbull: "If the court please, we have a stenographer here who has taken down the testimony in this case, and, if the court is in doubt, I ask that we refer to his notes in regard to what testimony was given." The court: "I remember the testimony. Edith Trickel did not testify to any such fact. There is no such testimony in the case. Proceed." Proper exceptions were made to these remarks, whereupon counsel for the defendant had the stenographer look over his notes of the testimony of Edith Trickel, and found where she had testified, on both direct and cross examination to wearing a jacket over her waist. At the close of the argument for the state, and before the instructions were given to the jury, the following proceedings took place: "Mr. Trumbull: If the court please, I have had the reporter look over his notes, and I find that my statement was correct, in that the witness Edith Trickel several times testified that she wore a jacket over her waist, and that this court and the counsel for the state are in error in stating that no such evidence was given, and at this time we ask the court to so instruct the jury." This request was denied by the court with the following remark: "Gentlemen of the jury, you will understand that you alone are the sole judges of the facts in this case, and you will rely upon your memory as to the testimony given." The effect on a juror of everything that is said by the court, during the trial of a case, which tends to indicate what the court thinks of the testimony, is so well under-

stood that it scarcely needs judicial expression. It can be seen that this testimony might have been considered important by the jury. The court very flatly and peremptorily told the jury that no such testimony had been given. While it is true that the stenographer's report is only testimony of what actually takes place at a trial, yet it is generally conceded to be the best testimony available, and, in this instance at least, the statement of facts which is certified to by the judge shows that the judge was mistaken, and that the testimony had been given as contended for by the defendant's attorney. So that the judge must have known that he was mistaken, and he ought to have candidly so stated to the jury. The fact that he refused to do so, and waved the whole matter aside by the statement that the jurors would judge from their own memory of what the testimony was, rather discredited the report of the stenographer than otherwise, and still left the jury with the comment of the court on the testimony unrecalled and unexplained. We think, under the circumstances as shown by the record, that this was error which may have been prejudicial to the interests of the appellant, and for this error the judgment must be reversed. This conclusion renders unnecessary a discussion of the other errors alleged, as they may not occur at a subsequent trial.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4658. Decided June 23, 1903.]

THE STATE OF WASHINGTON *on the Relation of Maurice A. Langhorne, Prosecuting Attorney, v. SUPERIOR COURT OF LEWIS COUNTY.*

APPEAL — COSTS INCURRED BY PAUPER — LIABILITY OF COUNTY.

The superior court is without jurisdiction to order the costs of an appeal, prosecuted by an accused *in forma pauperis*, to be charged against the county.

Original Application for Certiorari.

Maurice A. Langhorne, for relator.

PER CURIAM.—One George D. Carpenter was, on the 27th day of September, 1902, by the superior court of Lewis county, Washington, adjudged guilty of a felony. From that judgment he appealed to this court, and on the 23d day of October, 1902, he presented his motion, supported by an affidavit, to the superior court of Lewis county, wherein it was set forth that he was confined in the county jail of Lewis county, and that he was without means to pay the expenses incident to an appeal, and prayed that all the costs and expenses thereof be at the cost and expense of the county of Lewis. In response to said motion the court entered an order permitting the defendant to prosecute his appeal to the supreme court of the state of Washington *in forma pauperis*, and further ordered that said appeal be at the cost of, and that the cost thereof be paid by, the county of Lewis, the bill of all such costs to be presented to the judge of said court and audited by him before being paid. On April 3, 1903, the court made and entered its order directing the auditor of Lewis county to draw a warrant in favor of I. P. Callison,

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in the sum of \$20, in payment of a brief printed by said Callison for said Carpenter, to be used on his appeal in the case of *State of Washington v. George D. Carpenter*. Hon. Maurice A. Langhorne, prosecuting attorney of said Lewis county, objected to the making of said order by the said court, and made an application in this court for a writ of review to annul and set aside these orders as being beyond the power and jurisdiction of the superior court to enter and enforce. A return has been made to the show-cause order sending up the transcript, which shows substantially the facts related above.

We are all of the opinion that the court was without jurisdiction to make the order complained of. There is no provision of law whereby counties are chargeable with the expense of printing briefs in a criminal case, and certainly no provision for peremptory judgment against the county without any appearance or notice given to the county. It is asserted in the brief of the relator that the lower court conceded that he had no statutory authority to make the order complained of, but claimed that it was within the inherent power of the court to make and enforce said order, independent of any statute. We are unable to see that the doctrine of inherent power applies to a case of this kind at all. These are matters that do not go to the protection of the court in any of its rights, and are matters which must of necessity be governed entirely by statutory enactment, the right of appeal itself being purely statutory. The cases of *Stowe v. State*, 2 Wash. 124 (25 Pac. 1085), and *State ex rel. Rochford v. Superior Court*, 4 Wash. 30 (29 Pac. 764), are in principle conclusive on this subject.

Our conclusion is that the court was without jurisdiction to enter the order, and that the same is void. The judgment of the court will be reversed, and the cause remanded, instructing the trial court to deny the motion.

[No. 4508. Decided June 26, 1903.]

REBECCA M. NEFF, *Appellant*, v. STEWART S. NEFF *et al.*,
Defendants, JOHN C. DORNIN, *as Executor, Respondent*.

COMMENCEMENT OF ACTION — SERVICE OF COMPLAINT ON ATTORNEY —
AUTHORITY MUST BE SHOWN.

An order of the court dismissing an action as to one of the defendants was not erroneous, where no original process had ever been served upon him, but the amended complaint in the action had been served upon an attorney, and the proofs were conflicting as to whether or not the defendant had authorized that manner of service.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Affirmed.

Henry L. Strobridge and Merrick & Mills, for appellant.

Brownell & Coleman, for respondent.

PER CURIAM.—This is an appeal from an order dismissing the action as against the respondent. The original action was commenced in the superior court for Snohomish county in 1897 against Anna K. Neff and Stewart S. Neff on a certain promissory note. Defendant Anna K. Neff answered by her attorney, F. H. Brownell, but before the matter was brought to trial she died testate, and the superior court of Pierce county appointed the respondent the executor of her will.

The appellant duly presented her claim (the one on which this action is based) to the executor, which claim was rejected, and thereupon she filed her motion in this cause to substitute the respondent for defendant Anna K. Neff, and for leave to amend her complaint and continue

her action against the respondent. The motion was granted June 15, 1899, but nothing further was done until 1902, when the amended complaint was filed and served on the former attorney of Anna K. Neff. Thereafter respondent made a special appearance and moved to dismiss the action as to him, for the reason that the attorney for Anna K. Neff had no authority to appear for or represent him in the action; supporting his motion by the affidavit of the attorney to that effect. The other side sought to controvert this contention by showing by affidavit that the respondent had authorized the amended complaint to be served on this attorney. The trial court, however, as we have said, found against the appellant, and we shall not disturb its findings. There was a woeful lack of diligence in the prosecution of the action, and lapse of memory caused by the delays can easily account for the differences of opinion that now exist. Moreover, no original process was ever served on the respondent, and, if he is to be brought into court in an irregular manner, the proofs that he has authorized that manner ought to be clear and certain. *Ashcraft v. Powers*, 22 Wash. 440 (61 Pac. 161). This view of this question renders it unnecessary to discuss others suggested.

Judgment affirmed.

[No. 4532. Decided June 26, 1903.]

F. H. WHITWORTH *et ux.*, Respondents, v. GEORGE C.
McKEE, Appellant.

JUDGMENTS — COMMENCEMENT OF LIEN.

Where appeal has been taken from a judgment, the lien of the judgment does not become dormant until five years after the

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final determination of the cause on appeal, under Bal. Code, § 5132, which provides that the real estate of a judgment debtor shall be bound to satisfy any judgment "for the period of five years from the day on which such judgment was rendered," and Id., § 5143, which provides that "in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run."

SAME — FAILURE TO ISSUE EXECUTIONS FOR FIVE YEARS — REPEAL OF STATUTE.

Bal. Code, § 5192, which authorizes the issuance of execution by the judgment creditor at any time, provided a period of five years shall not have elapsed since the issuance of a prior execution, in which case execution should not issue until such judgment should be revived, has been modified and superseded by the later enactment of Bal. Code, §§ 5132, 5143, which limit the lien of all judgments to a period of five years, whether execution has been issued on them in the meantime or not, which, in cases of appeal, shall extend from the date of final judgment in the appellate court.

EXECUTION SALE — ACTION TO SET ASIDE — EVIDENCE — SHOWING AS TO PERSONALTY UNLIEVED ON.

In an action to set aside an execution sale of realty, a finding by the court that the judgment debtor had \$1,000 worth of personal property subject to execution was not warranted, where the testimony showed that this property consisted of household goods, office furniture, and a civil engineer's outfit of surveying instruments, since the statute exempts household goods to the value of \$500, and tools of trade to the value of \$500, and permits the selection of additional personal property to the value of \$250.

SAME — SALE OF REAL ESTATE — EXISTENCE OF PERSONALTY — PRESUMPTIONS.

A sheriff's return of the sale of real property is not void on its face, by reason of failure to show that no personal property could be found out of which the judgment could be made, but, in a collateral action to set aside the sale, the presumption would be that the officer performed his duty in this respect.

SAME — NOTICE TO JUDGMENT DEBTOR.

Bal. Code, § 4886a, which provides that after a party has once appeared in an action he shall be entitled to at least three days' notice of any trial, motion, application, sale or proceeding therein has no application to proceedings had to enforce the judgment, but merely defines the rights of the respective parties before judgment, and hence would not require notice to a debtor of

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Syllabus.

motion for the confirmation of an execution sale.

SAME — SALES GOVERNED BY EXISTING LAW.

The sale of real property under execution has been governed, since its enactment, by Laws 1899, p. 85, whether the execution was issued under a judgment rendered prior or subsequent thereto.

SAME — NOTICES OF SALE — POSTING — INSUFFICIENCY.

Laws 1899, p. 86, § 3, requiring the sheriff to post notices of the execution sale of realty "in three public places in the county, one of which shall be at the court house door, where the property is to be sold, and one posted on the property to be sold," is satisfied by the posting in a conspicuous place on the property levied on, although it may not be a "public place"; and by the posting upon one of several tracts, although somewhat widely separated, instead of upon each parcel to be sold.

SAME — PRESUMPTION AS TO OFFICIAL DUTY.

A sheriff's return reciting that notice of sale was posted in a public place at the court house is not void on its face, under a statute prescribing that the notice shall be posted at the court house door, inasmuch as it does not negative the fact that it was posted at the required place, and the presumption is that the officer complied with the law.

HOMESTEAD — NATURE OF RIGHT — ENACTMENT OF NEW LAW — EFFECT.

The passage of the homestead law of 1895 (Bal. Code, § 5214 *et seq.*) whereby the value of the property thereby exempted was increased, but a declaration of the claim was required to be executed, acknowledged and filed with the county auditor, did not operate as an abrogation of homestead rights acquired under the prior law, which had imposed no such duty on the claimant, inasmuch as a homestead is in the nature of a vested interest, which would not be destroyed by the mere repeal of the statute authorizing its acquisition.

SAME — EXCESS VALUE SUBJECT TO SALE — HOW SOLD.

Under the statutes of this state, a sale of homestead under a general execution is absolutely void; it can be sold at no time except for its excess of value, and this can be reached only by a sale in the manner provided by the law in force at the time of its selection.

EXECUTION SALE — ACTION TO SET ASIDE — DAMAGES.

In an action to set aside an execution sale of real property a judgment for more than nominal damages was erroneous, where

the only element of damage shown was the worry and discomfort of plaintiff, and that he could make no disposition of the property because of the continuance of the suit,—there being no showing of an actual loss by reason of that fact.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

James McNeny and R. J. Huston, for appellant.

Greene & Griffiths, for respondents.

The opinion of the court was delivered by

FULLEERTON, C. J.—On January 18, 1896, the appellant recovered a judgment against the respondents in the superior court of King county for the sum of \$4,357.60. The respondents shortly thereafter appealed from the judgment to this court, giving a cost bond only, which court, after a hearing on the merits of this appeal, affirmed the judgment, entering its judgment of affirmance on December 18, 1896. On October 10, 1901, the appellant caused an execution to issue on the judgment, which was placed in the hands of the sheriff, who levied upon and sold thereunder certain real property described as follows: "Lot nine (9) in block nine (9) of Fern Addition to the city of Seattle; lots one (1), two (2), and three (3) in block six (6) of Canal Addition to the city of Seattle; west one-half ($\frac{1}{2}$) of lots two (2) and three (3) of block sixteen (16) of Boren's Plat of an addition to the town (now city) of Seattle, all situate in King county, state of Washington." The lots were sold in three separate parcels, each of which was bid in by the appellant; the first for the sum of \$150, the second for the sum of \$150, and the third for the sum of \$1,500. Due return of the sale was made by the sheriff to the court on the 16th day of November, 1901, whereupon the sale was docketed for confirma-

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tion, and afterwards confirmed by an order entered on December 16, 1901. This action was brought to set aside the sale. The court found that the judgment under which the sale was had was void, that the sale was a nullity, that the same constituted a cloud upon the respondents' title which they were entitled to have removed, that the respondents had been damaged by the sale in the sum of \$500, and entered a judgment vacating and setting aside the sale, and for damages in the amount so found, together with the costs and disbursements of the action. This appeal is from that judgment. As the questions suggested by the assignments of error can best be considered by examining in order the several objections urged against the validity of the sale, it is in that manner we shall consider them.

1. By a reference to the dates above given it will be noticed that the execution under which the property was sold was issued more than five years after the date of the rendition by the superior court of the judgment on which it was based, but within five years from the date of its affirmance by this court. The respondents contend, and the trial court held, that, because more than five years had elapsed between the date of the rendition of the judgment by the superior court and the date of the issuance of the execution, that the judgment was at that time dormant and incapable of supporting an execution, and that the sale thereunder was void, under the rule of the cases of *Brier v. Traders' National Bank*, 24 Wash. 695 (64 Pac. 831); *Packwood v. Briggs*, 25 Wash. 530 (65 Pac. 946); *Hardin v. Day*, 29 Wash. 664 (70 Pac. 118), and *Hewitt v. Root*, 31 Wash. 312 (71 Pac. 1021). These cases do lay down the rule that a judgment becomes dormant and incapable of supporting an execution at the end

of five years from the date of its rendition, but none of them undertakes to determine at what date a judgment shall be deemed to have been rendered, within the meaning of the statute, in a cause which has been appealed to this court and the appeal determined here upon its merits; that is to say, whether the five year period commences to run in such a case from the date of the rendition of the judgment by the superior court, or from the date of the final judgment of this court. The statute therefore must be consulted to determine the question. Those directly applicable are the following (citations from Ballinger's Code):

"Sec. 5132. The real estate of any judgment debtor and such as he may acquire, shall be held and bound to satisfy any judgment of the district or circuit court of the United States, if rendered in this state, or of the superior or supreme court, or any judgment of a justice of the peace for the period of five years from the day on which said judgment was rendered, and such judgments shall be a lien thereupon to commence as follows: Judgments of the superior court of the county in which real estate of the judgment debtor is situated, from the date of the entry thereof; judgments of the district or circuit courts of the United States, if rendered in this state; judgments of the supreme court; judgments of the superior court of any county other than the county in which said judgment was rendered, and judgments of a justice of the peace, from the time of the filing and indexing of a duly certified transcript or abstract of such judgments, as provided by this chapter, with the county clerk of the county in which said real estate is situated."

"Sec. 5143. An appeal to the supreme court or stay of execution shall not affect any existing lien; and in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run. Personal property shall only be held from the time it is actually levied upon."

The learned counsel for the respondents have submitted

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an elaborate argument in an endeavor to show that a proper construction of these statutes requires the holding that the five year period commences to run at the date of the rendition of the judgment by the superior court in all cases, notwithstanding the apparent provision to the contrary contained in the last section quoted. But, without following the argument in detail, we think the contention cannot be sustained. Plainly, the "said five years" referred to in the last section was the "period of five years" mentioned in the first, during which the land of the judgment debtor should be bound by the judgment. It is equally plain, also, that the statute fixes the date of final judgment in the supreme court as the time from which the five year period shall commence to run "in all cases of an appeal," regardless of the nature of the case, or whether or not the judgment appealed from is affirmed on an appeal with or without a supersedeas bond. The legislature can, of course, fix the duration of a judgment lien at such a length of time as suits its pleasure; it can prescribe the time of its commencement and its ending, and make these hinge on the happening of particular events. And when it has done this in language clear and unmistakable, as it has in the statute before us, there is no room for construction, and the courts can do nothing else than give the statute effect. As the judgment on which the execution was issued was affirmed on appeal by this court on December 18, 1886, and the execution was issued on October 10, 1901, it was within the period of five years from the date of its rendition within the meaning of the statute, and consequently was not void for want of a live judgment to support it. There is nothing in *Sears v. Kilbourne*, 28 Wash. 194 (68 Pac. 450), which is against this view of the statute. On the contrary, the distinction here made was clearly pointed out in the opinion in that case, where the court says:

"The statutes of this state limit the lien of a judgment to five years from the date of its rendition, whether the same be a judgment of this court, the superior court, or that of a justice of the peace; providing, however, that, where an appeal is taken to the supreme court on any judgment 'the date of final judgment in the supreme court shall be the time from which said five years commence to run.' Bal. Code, § 5132, 5143."

2. It is next said that the execution is void because of the clause, found in § 5192 of the Code, which prohibits the issuance of an execution on a judgment after the lapse of a period of five years without the issuance of an execution. The whole of the section is as follows:

"The party in whose favor judgment has been given or may hereafter be given or entered in any court of record in this state or the territory of Washington may have an execution issued at any time for the collection or enforcement of the same: Providing, That if a period of five years shall have elapsed without an execution being issued on such judgment, then execution shall not issue thereafter until such judgment shall be revived in the manner provided for by law."

This section was enacted in its present form by the territorial legislative assembly of 1888 (Session Laws 1888, p. 94), and was doubtless intended to confer on the judgment creditor the power to keep his judgment alive indefinitely by the process of causing execution to issue thereon at intervals of time of less than five years' duration. In so far, however, as it had this effect, it was superseded by § 5132, *supra*, which was enacted later in time, and which limits the lien of all judgments to a period of five years, whether execution has been issued on them in the mean time or not. Now, it will be noticed that the particular language which is thought to render this execution void is found in the proviso, and we think it may fairly be

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questioned whether it did not fall by the repeal of the enacting part of the statute. A proviso is very rarely of itself an enacting clause in the sense that it makes that law which was not so before. Its natural and appropriate office is to limit and qualify what is expressly enacted, and is usually so identified with the text of a statute which it qualifies that, if such enacting part is repealed by a subsequent statute repugnant to it, the proviso will fall also. Sutherland, Statutory Construction, § 222. In the statute before us it is plain that the proviso was intended as a limitation on what precedes it. It is first enacted that an execution may issue on a judgment without limitation as to time either of the rendition of the judgment or of the issuance of an execution thereon, while the proviso limits the right to such judgments only as have had an execution issued on them within a period of five years. It was, therefore, a dependent proviso, which would be repealed by the repeal of the enacting clause. But if this were not so, it must be held to have been modified by §§ 5132 and 5143, *supra*. The evident purpose of these sections was to provide fixed periods of time within which an execution or a judgment could be issued. These were within five years from the date of the rendition of the judgment if no appeal is taken therefrom to the supreme court, but, if appeal be taken, then within five years from the time of the final judgment of the appellate court. As this judgment was appealed from and as the execution was issued within five years from the date of the final judgment of the appellate court, it was in time and was a lawful execution.

3. The writ of execution was a general writ directed against the property of the judgment debtors, and the return of the sheriff thereon does not show that he made

search for personal property before levying upon the real estate which he afterwards sold under the writ. It is said that this renders the sale void for two reasons; first, because the evidence shows, and the court found, that the respondents had some one thousand dollars worth of personal property subject to execution; and second, because such a return is void on its face. Taking up the question of the evidence first, all we find in the record is the following.

“Q. State whether or not you are the owner, or your wife, or both of you, owned any personal property at the time of the issuance of this writ of execution, on or about October 10, 1901. (After objection). A. Yes, sir: We had, of course, some personal property; we had our household goods; we had a piano; I had my instruments I was working with—I suppose that was personal property. Q. What kind of instruments do you refer to? A. A transit and other instruments in my use as an engineer. The Court: A general surveyor’s outfit? A. Yes, sir. I had a safe in my office, and office furniture. Q. About what was that all worth at the time this writ was issued? A. I suppose upwards of a thousand dollars. I, of course, couldn’t replace it for anything like that, but perhaps, sold under the hammer, it would’t bring any more.”

But surely in view of the liberal exemption laws of this state there is nothing here which justifies the finding that the respondents had personal property subject to execution of the value of \$1,000. Indeed, it would seem that there was no property at all on which the sheriff could have safely levied. The statute exempts to each householder within this state household goods to the value of \$500, and such other of his personal property as he may select to the value of \$250. The instruments and tools of trade used by the judgment debtor in his business as a surveyor were also exempt to the value of \$500. There are other

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designations of exemptions in the statute which this judgment debtor might have been able to have availed himself of had his personalty been levied upon, but the enumerated designations are sufficient to exempt all and more of the very property which he describes. Clearly, therefore, if it be necessary to show that there was personal property on which the sheriff might have levied in order to convict him of a dereliction of duty, the evidence here utterly fails to do so.

As to the second objection, it is not the rule that a sale of real property is void merely because the sheriff failed to return that he had been unable to find sufficient personalty to satisfy the writ before levying upon the real estate of the judgment debtor, even when the statute expressly provides, which ours does not, that the sheriff shall first levy upon the debtor's personal property. In a collateral action brought to set aside the sale, it will be presumed that the officer performed his duty in this respect. But statutes of this character are rarely held mandatory; the better rule is that they are directory merely, furnishing a ground upon which a confirmation of a sale might be successfully resisted, were it shown that there was personal property out of which the judgment could have been satisfied, but they do not make a return of the sale of real property, which fails to show that no personal property could be found out of which the judgment could be made, void on its face. On the contrary, such a return is good as against any form of attack other than direct assault. 2 Freeman, Executions (3d ed.), § 279. In any view of this record, therefore, the sale is not void, because of the silence of the return as to personal property.

4. The court confirmed the sale without requiring notice of the motion therefor to be served on the respond-

ents, and it is urged that the order of confirmation was without jurisdiction and void for that reason. The statute (Bal. Code, § 4886a) does provide that after a party has once appeared in an action he shall have notice of all subsequent proceedings, and that he is "entitled to at least three days' notice of any trial, motion, application, sale or proceeding therein, . . .", but it is evident that these statutes are intended to define the rights of the respective parties before judgment, and have no application to proceedings had to enforce the judgment. In proceedings to enforce the execution, the statutory notices applicable thereto are all that the statute authorizes or requires to be given. This being true, other or different notices could add nothing to the validity of the proceedings.

5. It is next contended that no legal notice of the time and place of sale was given. In view of the line of argument pursued by counsel in discussing this branch of the case as well as others of the objections made, it is well to state that the statute of 1899 (Laws 1899, p. 85 *et seq.*) has, since its enactment, governed the sale of real property under execution, whether the execution was issued upon a judgment rendered prior or subsequent thereto, and is the statute to which the sale in this case must conform if it is to be upheld. That statute provides, among other things:

"Sec. 3. Before the sale of property under execution, order of sale or decree, notice thereof shall be given as follows: . . . 2. In case of real property, by posting a similar notice, particularly describing the property for a period of not less than four (4) weeks prior to the day of sale, in three (3) public places in the county, one of which shall be at the court house door, where the property is to be sold, and one posted on the property to be sold, and publishing a copy thereof once a week, consecutively for the same period, in a newspaper of general circulation published in the county. . . ."

The sheriff's return recites:

" . . . that I received the annexed writ of execution on the 10th day of October, 1901, . . . that I duly served said writ . . . by levying upon all the right, title and interest of the defendants in said writ of execution named, in and to the following real estate, to wit, . . . by filing a copy of said writ, together with a description of said property, with the auditor, and a similar copy with the clerk of said King county, and that under and by virtue of said writ of execution, I advertised the foregoing described property to be sold by me at public auction at the court house door, in said King county, on the 16th day of November, 1901, at 10 o'clock a. m.; that previous to said sale I . . . caused said notice to be posted in three public places in said county, one of which was in a conspicuous place on the property so advertised as aforesaid, one in the United States postoffice, and one at the court house, all in King county, state of Washington,"

The principal objection on this branch of the case is that the sheriff failed to post a sufficient number of notices. The lands sold consisted of three separate tracts somewhat widely separated, and the return shows that but three notices were posted, one only of which was on the land. The contention is that the statute requires a notice of sale to be posted on each tract advertised to be sold, and that this sale is void because of the failure of the return to show that the notices of sale were so posted. But it seems to us that this contention is not supported by the statute. A sheriff having in charge a writ of execution may lawfully levy upon more than one tract of land belonging to the judgment debtor, and may lawfully advertise and sell all, or any number less than all, of the several tracts he so levies upon. This is clearly the meaning of the statute. The section prescribing the manner of sale expressly provides that "when the sale is of real property, consisting of

several known lots or parcels, they shall be sold separately or otherwise as is likely to bring the highest price," and after "sufficient property has been sold to satisfy the execution no more shall be sold;" leaving, it seems to us, no other conclusion than that the sheriff may lawfully levy upon several distinct tracts and advertise and sell them as one sale. It is equally clear that but three notices of sale need be posted to lawfully advertise a sale, as the statute so states in words incapable of any other meaning. As one of these must be posted at the court house door of the county in which the land is sold, it would be impossible to sell three separate tracts at one sale if a notice must be posted on each tract, as lawful notice of the sale could not be given;—it being remembered that a notice not provided for by law is not notice. But while we think the return shows a due compliance with the statute in this regard, still it would not necessarily have been fatal to the sale had it been otherwise.

"The authorities very generally hold that statutes requiring notice are directory rather than mandatory, and that mistakes in the notice or even a failure to give notice will not avoid the sale as against a purchaser not himself in fault." 20 Enc. Pl. & Pr. 200, and cases cited.

Other objections to the notice are that none of the tracts of land sold was in a public place, and hence a posting on the land would not be a compliance with the statute, and that the return fails to state that a notice was posted at the court house door. Neither of these objections are of merit. As to the first, it is true that the statute requires the notices to be posted in public places, but it specifically directs that one of them be posted on the property to be sold. This means that the notice posted on the land must be in a conspicuous place, that is, not in an obscure or hidden place, but it does not mean that a public place must be found on

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the land before a lawful notice can be given. The construction of the statute contended for would make it impossible to sell this land on execution at all, as a lawful sale thereof could not be made without posting a notice on the land, and a notice could not be lawfully posted on the land because no public place can be found thereon. The term "public place" is used in the statute in a relative sense, and the requirement is complied with when the notice is posted in a place which would be public when compared with other places within the prescribed area. As to the second objection, a return reciting that the notice was posted in a public place at the court house is not void on its face under a statute prescribing that the notice shall be posted at the court house door, inasmuch as it does not negative the fact that it was posted at the required place. It is always presumed that an officer performs his duty and complies with the law, and unless his return of his doings negatives that idea, they will be presumed regular; that is to say, an incomplete return is not of itself fatal to the validity of the officer's acts; it must appear affirmatively, either by the return itself or extraneous evidence, that there was a failure to comply with the law. This becomes clear when it is remembered that an officer's return on a writ is but his recital of the acts performed by him thereunder, not the acts themselves. It is on this latter principle also that an officer's return may always be amended so as to make it conform to the truth.

6. It appears that the lots in Boren's plat were, at the time of the levy and sale, occupied by the respondents as a home, and that they had been so thus occupied ever since the year 1881. The trial court found that these lots constituted the homestead of the respondents, and were exempt from levy and sale under a general execution such

as was issued in the present case, and that the attempted sale passed no title to them. This contention is urged by the respondents in this court. The contract on which the judgment was rendered was entered into in 1893. The law in force at that time exempted to every householder who was the head of a family a homestead, while occupied as such, consisting of a house and lot or lots in any city, or a farm of any number of acres, so that the value of the same did not exceed one thousand dollars. No mode was provided for the selection of such a homestead, the law simply providing that it could be selected at any time before sale. The statute further provided that, whenever the judgment creditor should be of the opinion that any homestead claimed under the provisions of the act exceeded in value the sum of one thousand dollars, he could have the same sold on filing an affidavit to that effect with the clerk of the superior court. Under these statutes we held that no formal declaration was necessary to select a homestead, but that its mere occupancy as such by the claimant and his family was sufficient. *Philbrick v. Andrews*, 8 Wash. 7 (35 Pac. 358); *Anderson v. Stadlmann*, 17 Wash. 433 (49 Pac. 1070). We also held that a general judgment was not a lien upon the homestead of the judgment debtor, and that a sale of the homestead under a general execution was void, and passed no title to the execution purchaser. *Asher v. Sekofsky*, 10 Wash. 379 (38 Pac. 1133); *Traders' National Bank v. Schorr*, 20 Wash. 1 (54 Pac. 543, 72 Am. St. Rep. 17); *Smalley v. Laugenour*, 30 Wash. 307 (70 Pac. 786). In 1895 a new homestead law was enacted. Ballinger's Code, § 5214 *et seq.* It provides that the homestead shall consist of the dwelling house in which the claimant resides and the land on which the same is situated, and is selected by executing and filing for rec-

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ord in the auditor's office a declaration of homestead, containing certain recitals, acknowledged in the manner that a grant of real property is required to be acknowledged. While a specific tract is required to be selected, its value is limited to two thousand dollars, and if, in the opinion of a judgment creditor, the homestead selected by his debtor is of greater value than two thousand dollars, he may have the excess applied to the satisfaction of his judgment by appraisal proceedings instituted in the superior court of the county in which the homestead is situated. Counsel, however, have no quarrel as to which of these statutes affects the question here. They agree that the latter has no application; presumably, although it is not so stated, because it materially increases the value of the homestead over that allowed when the contract was entered into on which the judgment was founded, and is thus in violation of that provision of the federal constitution which prohibits a state from enacting a law impairing the obligation of a contract; but counsel for the appellant contends that the statute of 1895 repealed the former laws, and because thereof the respondents cannot claim under the statute of 1895, hence, there is no statute at all authorizing them to claim a homestead as against this judgment. We agree with counsel that the later statute so far superseded the earlier one that no new homestead right can now be acquired under it, or could have been so acquired since the passage of the later statute, and that it is now necessary in order to impress real property with a homestead right, to execute, acknowledge, and file with the county auditor a declaration of homestead as provided in the later statute. But we cannot agree with the contention that the statute of 1895 so far repealed the prior laws as to destroy all the then existing homesteads and thus make subject to execu-

tion real property which at the time of its passage was not so subject. That this was not the legislative intent is evident from the act itself. There is no express repeal of the existing laws, and so far from purporting to destroy existing homesteads the act permits homesteads of increased value to be acquired, and provides a more efficient means for their admeasurement and protection. If, therefore, the intent of the legislature is allowed to govern, there was clearly no destruction of the existing homesteads. But perhaps the better reason is that a homestead in this state is in the nature of a vested interest, or a species of estate which, when once acquired, is not destroyed by the mere repeal of the statute authorizing its acquisition, but can be relinquished only by the voluntary act of the person holding it. On whichever of these grounds, however, the rule may be said to rest, the rule itself has been so firmly embodied in our decisions as not to be now overthrown. On no other principle can the decisions of *Wiss v. Stewart*, 16 Wash. 376 (47 Pac. 736); *Anderson v. Stadlmann*, *supra*, and *In re Feas' Estate*, 30 Wash. 51 (70 Pac. 270), be sustained. In each of these cases the homestead there in question was acquired under the laws existing prior to the passage of the act of 1895, and was enforced after its passage as against debts incurred prior thereto. While the question here suggested was not discussed in either of the cases, it was said in *Anderson v. Stadlmann* that the "homestead was impressed upon [the land in controversy] by the actual and continued residence thereon of the defendant Stadlmann and family," implying that the homestead interest was something more than a mere privilege conferred by the legislature as an act of grace which might be taken away or destroyed by that body at its pleasure—that it was, in fact, a vested interest.

The appellant, however, contends that, conceding that a homestead could have been selected out of these lands as against this debt, it must have been selected as prescribed by the law of 1895, and that this court so held in *Wiss v. Stewart* above cited. A remark in that case does support the contention, but this court has never allowed it to control in any subsequent case where the question was involved. On the contrary, the rule as applied has been directly the opposite. In the cases of *Anderson v. Stadlmann*, *supra*, and *In re Feas' Estate*, *supra*, the homesteads in question were selected prior to the act of 1895, and were held to survive that act notwithstanding no reselection had been made subsequent to its passage. Moreover, the contention itself is unsound in principle. If it be true that the act of 1895 superseded the prior laws in so far that no new right of homestead could be acquired under such prior laws after the passage of that act, then clearly the new act did something more than change the mode of selection under the prior laws; it took away the right of selection itself, leaving only existing homesteads, those which had been perfected by selection, to survive. It is also contended that the sale was valid notwithstanding the respondents may have had a homestead therein. The argument is that the homestead was of greater value than one thousand dollars, and could be lawfully sold for the excess, and that the decree, for that reason, instead of vacating the sale, should have directed that the value of the homestead be paid over to the respondents out of the purchase price of the property. Cases are cited from other jurisdictions where this contention is maintained, but, without stopping to review them specially, we think they are inapplicable under a statute like ours. Under our statute a sale of a homestead is not voidable merely, but abso-

lutely void, when had under a general execution. It can be sold at no time except for its excess of value, and this only after certain requirements provided by the statute are complied with. It seems unnecessary to argue that, when an involuntary sale of real property is required to be made in a particular manner, no other manner of sale will pass title.

We conclude, therefore, that the respondents acquired a homestead on these particular lots by selection prior to the act of 1895, which they have at all times since maintained; that, notwithstanding the value of the homestead is now greater than one thousand dollars, the excess cannot be reached by a general execution, but must be reached by a sale in the manner provided by the law in force at the time of its selection, and that the trial court correctly held the sale of these lots void.

7. The court found that the respondents had been damaged in the sum of five hundred dollars, and entered judgment in their favor for that sum. There is no justification in the record for this finding and judgment. Aside from the fact that the ordinary costs allowed by statute are all that can be recovered when claimed rights are sought to be enforced by the ordinary and usual processes of the law, there was absolutely no evidence of actual damages. Stating the elements constituting the damage, the respondent witness said: "I certainly am damaged by the continuance of this suit; I can make no disposition of the property, and the worry and discomfort is certainly continuing all the time." The suit he referred to was the action instituted by himself, which could hardly afford him any ground of complaint, and his general statement that he could make no disposition of the property, unaccompanied by a showing of an actual loss because of that

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Syllabus.

fact, formed no basis on which anything more than nominal damages could be assessed. As the trial court did not assess nominal damages none will be directed to be assessed by this court.

The judgment appealed from will be reversed, and the cause remanded to the lower court with instructions to enter a judgment vacating and setting aside the execution sale as to the lots in Boren's plat only, without the assessment of damages of any nature, further than the ordinary costs of the action. In all other respects the sale of the real property will be confirmed. The appellant will recover his costs in this court.

MOUNT, ANDERS, DUNBAR and HADLEY, JJ., concur.

[No. 4580. Decided June 26, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES G. STEWART *et al.*, *Appellants*.

CONSPIRACY — SUFFICIENCY OF INFORMATION.

An information charging defendants with feloniously conspiring together to obtain from a member of the state medical examining board, for a money consideration, the set of questions to be propounded at the ensuing medical examination to be held by said board as required by law, to which answers were to be prepared in advance, so as to enable one of the defendants to pass the examination and thereby fraudulently and unlawfully procure a license to practice medicine, states a cause of action.

SAME — EVIDENCE — VARIANCE.

Where the charge in an information is the unlawful conspiracy to fraudulently obtain examination questions from the state medical examining board, it would be immaterial whether the questions were actually obtained or not, and hence the admission by the state as a fact that the questions were not so obtained would not constitute a variance.

SAME.

The fact that one of the conspirators supposed that he was conspiring with a member of the board, through a go-between,

when in fact he was conspiring with his co-defendant, would be immaterial, since it is not necessary to show that conspirators actually come together in person.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

Sweeney, French & Steiner and *Richard Winsor*, for appellants:

To constitute indictable conspiracy there must be a combination or agreement of two or more persons to commit some act known and recognized as an offense punishable either as a crime or prohibited under penalties of statute, or there must be a combination and agreement between two or more persons to accomplish a lawful purpose by unlawful means. *Alderman v. People*, 4 Mich. 414 (69 Am. Dec. 321); *People v. Richards*, 1 Mich. 216 (51 Am. Dec. 75); *State v. Noyes*, 25 Vt. 415; *Commonwealth v. Hunt*, 38 Am. Dec. 347; *Smith v. People*, 25 Ill. 17; *State v. Potter*, 28 Iowa, 556; *State v. Bartlett*, 30 Me. 134. Where the unlawfulness of the means employed is relied upon to make the conspiracy a criminal one, the means must be set out with particularity and certainty. *State v. Ripley*, 31 Me. 386; *Hartmann v. Commonwealth*, 5 Pa. St. 60.

Defendants submit that there is an absolute variance in this case, because it is an impossibility for two men, alone, to conspire, when one of the alleged conspirators does not know the other in the transaction. *United States v. Frisbie*, 28 Fed. 808; *Woodworth v. State*, 20 Tex. App. 375. And further, because the testimony shows that the intention of both defendants was to get these questions from Dr. Wilson, who was not a member of the board, and known not to be a member by at least one of the alleged

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Argument of Counsel.

conspirators. *Evans v. People*, 90 Ill. 384; *Commonwealth v. Harley*, 7 Metc. (Mass.) 506.

In conspiracy, the gist of the offense is the unlawful combination or agreement; and an instruction that it is not necessary to prove that the parties ever actually came together was consequently erroneous. *State v. Rowley*, 12 Conn. 101; *State v. Sterling*, 34 Iowa, 444; *State v. Pule*, 12 Minn. 164; *State v. Burnham*, 15 N. H. 396; *State v. Noyes*, 25 Vt. 415.

W. T. Scott, Prosecuting Attorney, and Elmer E. Todd (Walter S. Fulton and Vince H. Faben, of counsel), for respondent:

For all offenses at common law not defined by statute the offender may be tried. Bal. Code, § 6774. Under the above section the common law offense of conspiracy is indictable. *Bradshaw v. Territory*, 3 Wash. T. 265. A conspiracy to do an act prejudicial to the public generally is indictable. Clark & Marshall, Crimes, pp. 318, 319; McLain, Criminal Law, § 962. Conspiracies which involve mischief to the public are indictable, although neither the object sought to be accomplished, nor the means used for its accomplishment, is criminal. *Commonwealth v. Ward*, 1 Mass. 473; *State v. Burnham*, 15 N. H. 396. An act, if accomplished, need not be indictable. If the design is opposed to public right and justice, it is sufficient. 6 Am. & Eng. Enc. Law (2d ed.), 848-850. In support of the sufficiency of the information, see *State v. Bartlett*, 30 Me. 132; *State v. Noyes*, 25 Vt. 415; *State v. Glidden*, 55 Conn. 46; *Commonwealth v. Andrews*, 132 Mass. 263; *Schwab v. Mabley*, 47 Mich. 572; *Carew v. Rutherford*, 106 Mass. 1.

The point is made that, because the appellants Lawson

and Stewart did not know each other by name in the transaction, therefore the charge in the information is not sustained. But, through their agent and mouthpiece, Braid, they dealt with each other and arranged the terms and conditions of the unlawful combination. They are therefore as effectually bound as if they had dealt with each other in person. It is not necessary to show that conspirators actually come together. *Spies v. People*, 122 Ill. 1; *Frank v. State*, 27 Ala. 37; *The Mussel Slough Case*, 5 Fed. 680; *United States v. Nunnemacher*, 7 Biss. 111; *People v. Mather*, 4 Wend. 229 (21 Am. Dec. 122).

The opinion of the court was delivered by

DUNBAR, J.—The appellants were prosecuted under the following information:

“They, the said James G. Stewart and O. V. Lawson, and each of them, in the county of King, state of Washington, on or about the 12th day of December, 1901, wilfully, unlawfully, wickedly, feloniously, falsely and designedly did conspire, combine, confederate and agree together to obtain from a member of the State Medical Examining Board for the State of Washington, a set of questions agreed upon by said board to be propounded at the ensuing medical and surgery examination to be held by said board as required by law, in advance of said examination, for a consideration in money, to wit: the sum of six hundred dollars (\$600.00), said sum to be paid to said member of said board in consideration of the delivery by said member of said questions to the said James G. Stewart, who, it was understood and agreed, as aforesaid, was to prepare the answers to said questions and to deliver the said questions and answers so prepared to the said O. V. Lawson, who, it was understood and agreed, would appear at the ensuing meeting of the State Medical Examining Board and then and there would submit to and take the examination then and there to be held by said board as required by law, and, by the fraudulent and unlawful use

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of said questions and answers so obtained, it was understood and agreed, as aforesaid, that the said O. V. Lawson would thereby be enabled to falsely, fraudulently and unlawfully pass said examination, and it was understood and agreed as aforesaid that the said O. V. Lawson would thereby obtain fraudulently and unlawfully from said board a license to practice medicine and surgery in the state of Washington, entitling the said O. V. Lawson to practice medicine and surgery under the laws of the state of Washington, with the intent then and there, on the part of each of said defendants, to defraud and injure the people of the state of Washington, said agreement, confederation and conspiracy then and there having a tendency to injure the public."

They were found guilty, and sentenced to pay a fine of \$500 and costs of suit. A demurrer to the information was interposed and overruled, which ruling is assigned here as error. We think it sufficient to say that the demurrer was properly overruled, and that the information stated a cause of action.

The defendants moved for a directed verdict after the introduction of the following written stipulation:

"It is hereby stipulated and agreed between the state of Washington, by the prosecuting attorney, and the defendant O. V. Lawson, that it is conceded and admitted to be a fact by the state that no person charged in or connected with the conspiracy charged in the information in this case applied to or obtained from any member of the State Medical Examining Board for the State of Washington a set of questions agreed upon by said board to be propounded at the medical and surgical examination ensuing after the 12th day of December, 1901, to be held by said board as required by law; that no such application was made by any such person for a consideration of money or otherwise; that no member of said state medical examining board was approached upon the subject by any such person."

This stipulation was entered into by the prosecuting attorney and attorney for the defendant Lawson. It is claimed by the appellants that this stipulation negatives every allegation of the information, and that thereby is established a fatal variance between the proof and the allegations of the information. The proof shows that at the time of the commission of this offense the appellants were advertising themselves as physicians in the city of Seattle; that appellant Lawson was not legally entitled to practice medicine, and did not have the requisite qualifications to pass the examination required by law; that the appellants Stewart and Lawson entered into an agreement by which Stewart was to obtain possession of the questions and answers which were to be submitted to the students by the medical board at its next meeting, whereby Lawson would be enabled to pass the examination and receive the proper certificate entitling him to practice medicine. Lawson and Stewart dealt with each other through an intermediary, one Braid. Stewart represented to Braid that he would obtain these questions and answers from one Dr. Wilson, whom he represented to be a member of the board. It developed during the trial that in all probability Wilson was a fictitious character. So far as the stipulation is concerned, it can make no material difference whether the questions were obtained from the board or not, or whether they were obtained at all or not, as the offense charged is the unlawful agreement to so obtain them. It appears plainly from the testimony that the intent of the appellants was to unlawfully obtain for Lawson the certificate or license desired. The crime was completed when they entered into the agreement to defraud the state medical board in the manner proposed. Neither the character nor the proper definition of a crime is dependent upon the suc-

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cess or failure of the enterprise. Nor does it make any difference that Lawson thought that the medium through whom the questions and answers were to be obtained was Wilson instead of Stewart, or even that he thought that the name of the man with whom he was conspiring was Wilson instead of Stewart. The two men actually arranged the terms and conditions of the unlawful combination through the aid of the go-between, and they are as responsible as though they had dealt with each other in person. It is not necessary to show that conspirators actually come together, or that they are acquainted with each other.

“The gist of the offense is the fraudulent and corrupt combination, with intent that injury shall result. It is sufficient if two or more, in any manner, through any contrivance, positively or tacitly, come to a mutual understanding to accomplish a criminal or unlawful design.” 4 Am. & Eng. Enc. of Law, 587.

Accepting appellants' definition, viz., that to constitute an indictable conspiracy there must be a combination or agreement of two or more persons to commit some act known or recognized as an offense punishable either as a crime or prohibited under penalties of statute, or there must be a combination and agreement between two or more persons to accomplish a lawful purpose by unlawful means, we think the information and proof were sufficient. For, while it is not unlawful to pass the medical examination or to attempt to pass it, the information alleges, and the proof shows that the appellants conspired together for the purpose of assisting Lawson to do a lawful thing in an unlawful manner. While not unlawful in its nature, it was unlawful in respect to the means to be used in accomplishing it.

It is insisted by the appellants that, where the unlawful means only is involved, the information must set forth the

conspiracy with certainty and particularity. But we think the information in this particular is not subject to criticism. No error is discoverable in the admission or rejection of testimony, or in giving or refusing to give instructions.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and HADLEY, JJ., concur.

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[No. 4607. Decided June 26, 1908.]

MARIAN ARMSTRONG *et al.*, Appellants, v. TOWN OF COSMOPOLIS, Respondent.

MUNICIPAL CORPORATIONS — ACTION AGAINST FOR WRONGFUL DEATH —
FAILURE TO PROVE MANNER OF DEATH — NONSUIT.

In an action against a municipal corporation to recover for wrongful death, alleged to have resulted from defendant's negligence in failing to provide guard rails for a foot bridge, plaintiffs were properly nonsuited, where there was no evidence showing that plaintiff had been upon the bridge at the time of his death, and the method of his death was merely a matter of conjecture from the fact that he had been found in the water near the bridge.

Appeal from Superior Court, Chehalis County.—Hon. MASON IRWIN, Judge. Affirmed.

Govnor Teats and W. H. Abel, for appellants:

"It is well settled that, where there is uncertainty as to the evidence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being disputed, fair-minded men will honestly draw different con-

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clusions from them." *Richmond & D. R. R. Co. v. Powers*, 13 Sup. Ct. 749 (37 L. ed. 642); *Northern Pacific Ry. Co. v. Adams*, 116 Fed. 324; *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324 (58 Pac. 246); *Philadelphia & R. Ry. Co. v. Young*, 90 Fed. 709; *Abrams v. Seattle & Montana Ry. Co.*, 27 Wash. 507 (68 Pac. 78); *Ziegler v. Spokane*, 25 Wash. 439; *Nelson v. Willey S. & N. Co.*, 26 Wash. 548 (67 Pac. 237).

J. B. Bridges, for respondent:

Probably the strongest reason for the court's taking the case from the jury was that the testimony of the appellants left it for the jury to speculate as to how and when deceased met his death. Upon a very small amount of material testimony, the question of negligence is for the jury; but the evidence of the manner of death must be sufficient to convince the fair and unprejudiced mind. *Sorenson v. Menasha Paper & Pulp Co.*, 14 N. W. 446; *Morrison v. Phillips, etc., Construction Co.*, 44 Wis. 405; *Fritz v. Salt Lake, etc., Light Co.*, 56 Pac. 90; *Corcoran v. Boston & A. R. R. Co.*, 133 Mass. 507; *Rebelsky v. Chicago & N. W. Ry. Co.*, 44 N. W. 536; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25 (70 Pac. 111).

The opinion of the court was delivered by

DUNBAR, J.—This action was brought for the wrongful death of husband and father, caused by alleged unguarded and unlighted sidewalks in the defendant town, Cosmopolis. The town is situated on the Chehalis river. First street, where the accident occurred, is a long street running parallel with the river, and one block back. Crossing this street practically at right angles, and west of the business portion of the town, is a slough called "shingle mill slough," used by the shingle mill on the west bank as a log pond. The tide ebbs and flows at this point to the extent

of about eight to twelve feet. There is no wagon bridge across the slough, but the town constructed across the same, and was operating at the time of the accident, a bridge about eight feet wide, which was used by pedestrians. The sidewalk along the north side of the street is a main thoroughfare, and a number of people reside on the west side of the slough, and use the bridge in going to and returning from the town. The sidewalk, including the bridge, is about three or four feet above high tide. Guard rails were originally placed along the sidewalk, but at the time of the accident, and for a long time prior thereto, the guard rails had been destroyed, and there were none in existence at that place. The complaint in substance charges that the plaintiffs' husband and father, in going to his home at the corner of Second and I streets, owing to the extreme darkness of the night, missed his way, and, instead of proceeding along I street, proceeded west on the sidewalk on First street, and when he had reached the east side of the bridge crossing the slough, there being no railing or guard, and the night exceedingly dark, and no lights provided by the said town, and it being impossible for him to see and know of the dangerous condition of the said sidewalk and bridge, he walked off from the sidewalk and bridge into the slough below, which at that time was filled by the tide, and was drowned. Damages were claimed in favor of appellant Marian Armstrong, wife of the deceased, in the sum of \$10,000, and, for the benefit of the infant, William J. Armstrong, \$5,000. At the close of the plaintiffs' testimony, the respondent made motion for nonsuit, based on the following grounds: (1) That the evidence thus far introduced shows no negligence on the part of the defendant; (2) that the evidence thus far introduced does show contributory negligence on the part of the plaintiffs' intestate, husband and father of the plaintiffs;

(3) on the ground that there is no evidence showing or tending to show that Mr. Armstrong, the husband and father of the plaintiffs, fell off the bridge as alleged in the complaint. This motion was sustained by the court, and from the judgment following such motion this appeal is taken.

There are several questions discussed in the brief of appellants, but it is conceded that the court granted the motion on the third ground alleged, viz., that there was no evidence showing or tending to show that the deceased fell off the bridge as alleged in the complaint. With the view that we take of the decision of the court on this proposition, it becomes unnecessary to discuss the other errors alleged. The testimony is brief, and shows that the deceased in company with a friend, both in an intoxicated condition, had been drinking at a saloon, and had been up until about two o'clock in the morning; that it was very dark, and that the friend undertook to show the deceased home; that when they arrived at the point where the deceased thought he was near his home, he told the friend, who had a lantern with him, that he was near home, and that it was not necessary for him to proceed with him further, and the friend returned to town. Not reaching home that night, search was made, and the body of the deceased was found, two days afterwards, just above the bridge on the slough. Some keys—which were claimed to be, and probably were, his—and a little money were found on the other side of the bridge, and about seventy-five feet from the body. A large overcoat, which the deceased had on when last seen, was also found in the slough, a few feet away from the body. This is all the testimony there is tending to show that the deceased fell off the bridge across the slough. He was not at this point when he was last seen, and it was not necessary for him to be there. The theory

of the appellants is that deceased became lost and bewildered in the darkness, and stumbled over the side of this bridge into the water, where he was drowned. It is earnestly insisted by counsel for appellants that this was sufficient testimony to go to the jury, and it was for them to determine whether it was sufficiently convincing to warrant a conclusion that deceased did fall off the bridge. But while it is true that the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony. There are many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants. Deceased might have fallen into the slough at another point and been washed up by the action of the tide to the location at which he was found. He might have stumbled into the Chehalis river and have been carried by the tide to the place of his deposit. He might, as many a man has done before, have concluded to throw himself into the slough with suicidal intent. He might have been knocked into the slough by some one who had ulterior purposes to subserve. The fact that his overcoat was not upon him is a very strong circumstance tending to show that he did not fall into the slough while walking along on his way home. The whims which seize and control intoxicated men and the accidents that are liable to occur to them are so manifold that it would be the merest guesswork to undertake to account for the location of the body of the deceased at the point where it was found as shown by the record in this case.

We think there was no competent testimony adduced which should have been submitted to the jury. The judgment is therefore affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and HADLEY, JJ., concur.

[No. 4646. Decided June 26, 1903.]

THOMAS J. MILLER, *Appellant*, v. ORIN D. SULLIVAN,
Respondent.

SCHOOL DISTRICTS — CONTRACT OF DIRECTORS FOR REPAIRS — VALIDITY.

The payment by the county treasurer of a school warrant issued by a board of directors in payment of services in repairing the school house rendered by themselves to the district may be enjoined at the suit of a citizen and taxpayer, although the amount involved is trivial and no one else could be procured to render the services, since contracts of that character are expressly forbidden by Bal. Code, § 2316.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Reversed.

Vance & Mitchell, for appellant.

J. W. Robinson, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action to enjoin the defendant Phillips, *ex officio* treasurer of school district No. 3 of Thurston county, from paying a school warrant issued by the directors of that district to one of their associate directors for the sum of \$25.30. The complaint alleges in substance the official character of the defendants, and that the plaintiff is a citizen and taxpayer of the district; that the directors of the school district contracted with defendant Sullivan, one of their associate directors, to make repairs to the school building in their district; that defendant Sullivan, under such contract, furnished the labor and materials and did the work; that after the contract was completed Sullivan presented his bill therefor to the district, and that the district, by its board of directors, issued to Sullivan, in payment for the work done and materials furnished, a warrant for the sum of \$25.30; that

by reason of the fact that Sullivan was a director of said school district the warrant issued in payment for the debts created by said contract was illegal and void. Defendant Phillips made no appearance in the action. Defendant Sullivan answered the complaint, and, after denying the material allegations of the complaint, alleged the facts as follows:

“Further answering, and by way of defense, this defendant alleges the facts to be: That on August 5, 1901, the board of directors of school district No. 3 of Thurston county held a special meeting at which it was determined that it would be necessary to repair the school building in certain particulars, and after such board met attempted to secure parties to do the work required; but they were unable to do so. That thereafter, by reason of the fact that it would be necessary to have such repairs done prior to opening of the next school term in said district, to wit, in September, 1901, and by reason of the fact that they could not secure the work to be done elsewhere, the three directors, to wit, Sullivan, Spillman, and Sturne, secured the services of J. L. Meed, a carpenter, and at once began to repair the schoolhouse as necessity required, and in doing so J. L. Meed worked two and one-fourth days at \$2 per day, amounting to \$4.50; A. L. Sturne worked one and one-half days at \$2 per day, amounting to \$3; A. Spillman worked two and one-fourth days at \$2 per day, amounting to \$4.50; and this defendant worked two and three-fourths days at \$2 per day, amounting to \$5.50. That in doing said work it was necessary to have some lumber for staging, which this defendant furnished, and which was used in doing said work without charge; but that, after the work had been finished, the district desired this staging lumber to remain at said building for future use, and it was then and there agreed that the said Sullivan should receive \$1.50 for such lumber. And this defendant alleges that such services and labor were performed and given by said directors of said district in good faith and as a matter of necessity, because carpenters could not be had

to do the work, and the directors agreed, after such services were performed, that such labor should be paid for at the rate of \$2 per day, which was much less than they could have secured the same or similar services from other parties, even if they could have secured them at all, which they could not do at that time. That in making said necessary repairs the district incurred the following indebtedness, to wit: George Martin & Son, for nails, \$1.49; Thomas Counts, for hauling lumber used in repairing said schoolhouse, \$2; Mrs. Lettie Spillman, for scrubbing and cleaning the schoolhouse after the repairs were completed, \$2; brooms and screw eyes, 81 cents. That these various items amounted to \$25.30. That, by reason of the fact that there was many times no money in the special fund out of which certain indebtedness had to be paid, it had been the custom for many years for the directors of this school district to draw the warrant in favor of some person agreed upon for the purpose of paying indebtedness of this character, to wit, such indebtedness as there was no funds in the special funds for that purpose, and such warrant was then converted into cash by the party to whom it was issued, at par, and such indebtedness as was represented by said warrant paid from the proceeds thereof. That the items of indebtedness above set forth could not have been paid, except from the special fund, in which there was no money at that time, and hence the warrant here in dispute was issued in the name of O. D. Sullivan, this defendant, as a mere convenience, and for the reason that there was no money in the fund from which said items had to be paid, and said warrant was issued to said Sullivan, and he directed to convert the same into cash, which defendant did, at par, and with the proceeds thereof the various individuals hereinabove mentioned were paid the items of indebtedness as hereinabove set forth. That while the warrant upon its face appeared to have been issued to the said Sullivan, as though he was dealing with the district, the facts are as hereinabove set forth, and no contract of any kind or character was ever entered into, except as hereinabove fully set forth."

The plaintiff for reply denied that the board of directors attempted to secure other parties to do the work, and denied the necessity for the directors to do the work. At the trial the plaintiff testified to his citizenship and that he was a taxpayer in the district. Defendant Sullivan was then called as a witness for the plaintiff, and testified that he did certain work by way of repair under the direction of the carpenter, but that he had no contract with the district. Plaintiff thereafter rested his case, and the respondent moved the court to dismiss the action because of failure of proof, which motion the court granted, and dismissed the cause. Plaintiff appeals.

The appellant maintains, we think correctly, that there was but one issue under the pleadings, and that was whether or not the plaintiff was authorized to maintain the action as an interested citizen and taxpayer. The affirmative answer shows that the board of directors of the school district determined that certain repairs were necessary to the school building; that they were unable to secure other parties to do the work, and therefore undertook to do it themselves; that they secured the services of a carpenter for that purpose; that when the work was done the warrant was drawn in favor of one of the directors, viz., defendant Sullivan, in payment of services rendered by himself and in payment of services rendered by the other two directors, and also in payment for materials and labor furnished by others. There can be no doubt that this answer shows that each of the directors had a direct pecuniary interest in the repairs which were placed upon the building. They employed themselves and fixed their own wages. The statute, at § 2316, Bal. Code, provides:

“It shall be unlawful for any director to have any pecuniary interest, either directly or indirectly, in any erection of school houses, or for warming, ventilating, furnishing

or repairing the same, or be in any manner connected with the furnishing of supplies for the maintenance of schools, or to receive or accept any compensation or reward for services rendered as director."

This section is positive, and makes no exception for necessity. In the case of *Northport v. Northport Townsite Co.*, 27 Wash. 543 (68 Pac. 204), where a member of the city council was also a stockholder in a lumber company which sold lumber to a contractor to be used in constructing sidewalks, this court held that the lumber company could not enforce a contract under a statute similar to the section above quoted. It is true that in the above case the statute also provided that, if any claim for compensation be audited and allowed, it "shall not be paid by the treasurer;" but we think the effect of these two statutes is the same, viz., to make the contract unlawful and unenforceable. The reasons given for the decision in *Northport v. Northport Townsite Co.* are equally applicable to this case. The allegations set up in the answer clearly show that the warrant was unlawfully issued to one of the directors for repairs in which each of the directors had a pecuniary interest. For this reason the plaintiff was entitled to a decree restraining the payment, when the disputed facts of citizenship and interest were shown. This being shown, it was the duty of the court to restrain the payment of the warrant unlawfully issued.

It is argued by respondent that, since the amount of the warrant in this case is only \$25.30, the cause should be dismissed as trivial. It is true the amount involved is small, but the question at issue is one of much importance, as it involves the duty of public officers intrusted with the disposition of common school funds, much of which is paid out in small amounts. School directors and other public officers should not be permitted to violate the posi-

tive public law, even where the amount of money involved is small.

The cause is reversed and remanded, with instructions to the lower court to enter a decree restraining the payment of the warrant in question.

FULLERTON, C. J., and DUNBAR and HADLEY, JJ., concur.

[No. 4703. Decided June 26, 1903.]

W. H. COWLES, *Appellant*, v. UNITED STATES FIDELITY
AND GUARANTY COMPANY, *Respondent*.

PRINCIPAL AND SURETY — CONTRACTOR'S BOND — WAIVER OF CONTRACT
CONDITIONS — DISCHARGE OF SURETY.

A guaranty company which, for a compensation, becomes surety upon the bond given by a building contractor for the faithful performance of his contract cannot escape liability by reason of deviations from the exact terms of the contract, where such provisions were waived by the contractor and no damage is shown as resulting to the surety by reason thereof.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Reversed.

Stephens & Bunn, for appellant:

The contract under consideration is, in fact, an insurance contract, and should be construed as other insurance contracts are construed. *Remington v. Fidelity & Deposit Co.*, 27 Wash. 435; *People ex rel. Kasson v. Rose*, 174 Ill. 310 (51 N. E. 246, 44 L. R. A. 124); *Shakman v. United States Credit System Co.*, 92 Wis. 366 (66 N. W. 528); *Walker v. Holtzclaw*, 57 S. C. 459 (35 S. E. 754). If the contract under consideration be an insurance contract,

32 120
133 60
32 120
35 431
35 433
32 120
36 546
32 120
37 695
d38 97

then the contractor, who was and is a general agent of the insurance company, had a right to waive the provisions of the contract with reference to the changes being ordered in writing, and such waiver is binding upon the insurance company. *Sengfelder v. Mutual Life Ins. Co.*, 5 Wash. 121; *Cole v. Union Central Life Ins. Co.*, 22 Wash. 26 (47 L. R. A. 201). The facts in the case at bar are identical with the cases which hold that where the contract requires certificates in writing before payments are made, if payments are made without the written certificates, but not in excess of amounts that would be paid upon written certificates, the waiver of the written certificates does not release the surety. *Hamilton v. Woodworth*, 42 Pac. 849; *DeMattos v. Jordan*, 15 Wash. 388.

Danson & Huneke, for respondent:

Respondent contends that radical departures from the plain provisions of the contract, made without its knowledge or consent, discharge it absolutely from all liability on the bond sued on. *Drumheller v. American Surety Co.*, 30 Wash. 530 (71 Pac. 25); *Burnes Estate v. Fidelity & Deposit Co.*, 70 S. W. 518; *United States v. American Bonding & Trust Co.*, 89 Fed. 925; *United States v. National Surety Co.*, 92 Fed. 549; *Electric Appliance Co. v. U. S. Fidelity & Guaranty Co.*, 85 N. W. 648 (53 L. R. A. 609); *American Surety Co. v. Cement Co.*, 57 Pac. 237; *Bank of Tarboro v. Fidelity & Deposit Co.*, 38 S. E. 908; *March v. Fidelity & Deposit Co.*, 29 Atl. 521. The following are cases in which sureties have been discharged on violations of the contract similar to those in the case at bar: *Chapman v. Eneberg*, 68 S. W. 974; *Stillman v. Wickham*, 76 N. W. 1008; *Simonson v. Grant*, 36 Minn. 439; *First National Bank v. Goodman*, 77 N. W. 756;

O'Neal v. Kelley, 47 S. W. 409; *Truckee Lodge v. Wood*, 14 Nev. 293; *Bragg v. Shain*, 49 Cal. 131; *St. Mary College v. Meagher*, 11 S. W. 608; *Weed Sewing Machine Co. v. Winchell*, 7 N. E. 881.

The opinion of the court was delivered by

DUNBAR, J.—The defendant Creutzer entered into a contract in writing with appellant, whereby Creutzer agreed to construct a dwelling for appellant. The contract provided that Creutzer should give a surety bond in the sum of \$3,000 to secure the performance of all the terms of the contract. Respondent became surety on the bond so required. Creutzer failed to comply with the contract. Appellant completed the work and brought this action to recover \$3,000, which amount he alleges he paid, to complete the dwelling in excess of the contract price. At the close of the evidence on the part of appellant (plaintiff below), the respondent surety company challenged the sufficiency of the evidence, and moved the court to discharge the jury from further consideration of the case, and direct what judgment should be entered, upon the following grounds: (1) That the evidence for the plaintiff shows that there are numerous alterations made in the contract and in the work, other than upon the written order of the architect; (2) that the value of these changes and alterations is not computed by the architects, as required by the contract, and the value thereof either added to or deducted from the contract price; (3) that the evidence shows that plaintiff and the contractor, Creutzer, entered into a distinct and separate agreement as to his compensation for all alterations other and distinct from the provisions of the contract; (4) that the evidence of the plaintiff shows that plaintiff released the contractor, Creutzer, from all liability on this bond; (5) that the evidence shows that,

contrary to the provisions of the bond, plaintiff and the contractor made an agreement whereby certain grading was included and work provided in the contract, and it was not provided for therein; (6) that the evidence of plaintiff shows that a payment, to wit, that of \$35, on account of the bond in this case, was made by the plaintiff and certified by the architect as a proper charge under the contract. The court sustained the motion, on the ground that the changes were not ordered in writing, holding that as against the surety company the parties could not waive the provision of the contract which provided that all changes should be ordered by the architect in writing, and that the provision was manifestly made for the benefit of the surety company. Appellant excepted to the ruling of the court granting the motion and making the order in accordance therewith. The contract is too long to be set forth in detail, but it is the ordinary building contract in its general scope, and the bond is in form the ordinary surety bond given in such cases. The section of the contract which is the subject upon which the main controversy in this case arises is as follows:

“No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architects, and, when so made, the value of the work added or omitted shall be computed by the architects, and the amount so ascertained shall be added to or deducted from the contract price. In case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three disinterested arbitrators; one to be appointed by each of the parties to this contract, and the third by the two thus chosen, the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference.”

This provision of the contract was waived by the con-

tractor and the owner and the architect. Subsequently, however, the architect audited and certified the amount which should be paid for changes, extras and alterations, and it is the contention of the appellant that such an act on the part of the contractor and principal in the bond was binding upon the respondent surety company, and a neglect or a default of any of the requirements of the written order of the architect cannot be taken advantage of by the respondent surety company; that the contractor was the general agent and representative of the surety, to act for it, and to waive, if he saw proper, on behalf of the surety company, anything within the purview of his agency.

There are no material contested questions of fact so far in this case, and its proper determination hinges upon the legal proposition announced above. It is contended by the appellant that a distinction exists between the liability of a non-compensated surety and that of a compensated surety; that the doctrine of *strictissimi juris*, which has been invoked successfully by accommodation bondsmen, should not apply to parties who furnish bonds for compensation. We have not been able to obtain any light from the cases cited from this court, any further than that they discountenance the old rule that there should be a difference in construction between bonds and other contracts, even in cases where the bonds were given purely as a matter of accommodation. We think, however, on general authority, that, while this class of suretyships is comparatively new, a distinction has been clearly announced by the courts, and that this character of suretyship is governed by the rules governing insurance contracts. Guaranty insurance is thus defined by Mr. Frost in his work on *The Law of Guaranty Insurance*, § 2, as follows: "For purposes of classification and treatment herein, guaranty insurance contracts may be divided into three general classes,—those of fidel-

ity, commercial, and judicial insurance." Commercial insurance is defined as having reference to indemnity agreements issued in the form of insurance bonds or policies, whereby parties to commercial contracts are to a designated extent guarantied against loss by reason of a breach of contractual obligations on the part of the other contracting party. To this class belong policies of contract, credit, and title insurance. Then follows a definition of fidelity insurance and judicial insurance, distinguishing them from commercial insurance. In his criticism of courts which have insisted on following the old rule, the author pertinently remarks:

"It is but natural that courts, so long accustomed to extending the 'rule of favoritism' towards the surety in the old-time private bonds, should be slow to recognize that with the passing away of the reason for the existence of the rule by the advent of the compensated surety, the rule itself should pass away. The contract of guaranty insurance is invariably entered into for a compensation, and usually after the fullest investigation, and frequently under stipulations largely technical in character, based upon written representations relative to the nature and extent of the risk. The policy is written by a company incorporated for the express purpose of furnishing guaranty bonds as a means of revenue to the corporation and its stockholders."

This class of insurance cannot be distinguished in principle from what is called guaranty insurance, where the guaranty company guaranties the honesty and efficiency of employees. Such a bond was construed by this court in *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429 (67 Pac. 989), as follows:

"Bonds of this character are, in their nature, insurance contracts, to indemnify the employer against the dishonesty of employees. They are issued for profit, and the

same rules of construction must apply thereto as apply to other insurance contracts. If, looking at all its provisions, the contract is fairly and reasonably susceptible of two constructions, one favorable and the other unfavorable to the insurance company, the latter, if consistent with the object for which the contract was made, must be adopted, for the reason that the instrument which the court is required to interpret was prepared by the attorneys, officers, or agents of the insurance company;"

citing many cases. As to the right of the parties to the original contract to vary the terms of the contract, see 1 Joyce on Insurance, § 273. Also *Grafton v. Hinkley*, 111 Wis. 46 (86 N. W. 859), where a contract for the construction of a building provided that the contractors should be bound to perform a certain portion of the work, and that they might become bound to perform additional work and to complete the building on the owner's giving a written notice, prior to a certain date, of his election to have such contractors continue the work. The contractors executed a bond for the faithful fulfillment of the contract on which defendants were sureties. The owners served no written notice directing the contractors to continue work, but they did continue, and accepted a parol notice. It was held that the work subsequently done was done under the original contract, and that no new contract was entered into between the parties so as to release the sureties from liability for the contractors' failure to complete the building. The court quoted the following language from *Benjamin v. Hillard*, 23 How. 149:

"It is clear that the mere prolongation of the term of payment of the principal debtor, or of the time for the performance of his duty, will not discharge a surety or guarantor. There must be another contract substituted for the original contract, or some alteration in a point so material as in effect to make a new contract, without the surety's

consent to produce that result. But when the essential features of the contract and its objects are preserved, and the parties, without objection from the surety, and without any legal constraint on themselves, mutually accommodate each other, so as better to arrive at their end, we can find no ground for the surety to complain."

In this case we think it may be well said that no other contract was substituted for the original contract, and that the alterations in the contract were not so material as to make a new contract; but that there was simply an undertaking on the part of the parties to the original contract to mutually accommodate each other; so, applying the language just above quoted, as "better to arrive at their end," the thing provided for in this contract was done, and the divergence from the strict terms of the contract was merely a matter of detail. The agreement for the alterations was made by all the parties who were entitled under the contract to make it. The consent was given by the party who was authorized to give consent; not, it is true, in the form prescribed, viz., in writing, but that goes more to form than to substance, and, in the absence of a showing of some damage, should not be allowed to avoid the contract, or the policy of insurance which became a part of it. The bond is subject to the contract, and was made after the contract. It is the contract instead of the bond which is primarily to be construed, and the construction of the contract cannot be affected by the fact that a bond is given for its performance. It must be construed with reference to the gathered intention of the parties to the contract, and whatever is binding upon them is binding upon the surety, who becomes a party to the contract, identified with the contractor.

In *Smith v. Molleson*, 148 N. Y. 241 (42 N. E. 669), it was held that, where a building contract provided that

plaintiff was to make payments to the contractors upon certificates furnished by plaintiff's superintendent, the mere fact that such payments were made without such certificates was not such a departure as would relieve the contractor's sureties from liability, where they were no greater in amount than they would have been if such estimates had been exacted by plaintiff; which is a case, we think, exactly in point with the case at bar. That case went further than it is necessary to go to reverse the judgment in this case, and held that a surety on a contractor's bond was not released by reason of the fact that, after the contractors failed to complete the work and plaintiff gave the notice required by the contract in order to terminate it, he subsequently recalled the notice and allowed the contractor to proceed with the work, during which time the loss for which the surety was held liable occurred. It is true that there is a conflict of authority on this proposition, but we are inclined to follow the authorities cited, and hold that this guaranty company, being a company which is doing business for compensation, ought to be bound by the law governing fidelity guaranty companies and insurance contracts. It not appearing that any damage was done by the slight variance in the terms of the contract, or that any collusion or fraud was attempted on the part of the contractor and the owner, we conclude that the court erred in sustaining the motion challenging the sufficiency of the testimony. The same reasoning will apply to the other grounds of the motion.

The judgment will be reversed, and the lower court instructed to proceed with the trial of the cause.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

[No. 4571. Decided June 27, 1903.]

THE STATE OF WASHINGTON, *Appellant*, v. J. C. PETIT,
Respondent.

BURGLARY — BUILDING ENTERED — FLAT CAR.

A flat car loaded with freight, which was covered with a heavy canvas is not the character of structure contemplated by the term "railroad car," so as to make the felonious taking of goods therefrom constitute the crime of burglary, under Bal. Code, § 7104, which defines the crime as the unlawful entry in the night time, or the unlawful breaking and entry in the day time of any house, office, store, railroad car, etc., or any building in which goods are kept.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

Clyde V. Warner, Prosecuting Attorney (*C. B. Graves* and *Austin Mires*, of counsel), for the State.

Pruyn & Slemmons, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The defendant was charged with burglary upon the following information:

"The said J. C. Petit, on the 19th day of October, A. D. 1902, in the county of Kittitas, state of Washington, did then and there unlawfully break and enter in the night-time a railroad car, to wit, a flat car used for carrying freight and merchandise, belonging to and property of the Northern Pacific Railway Company, said flat car being then and there loaded with wheat in bags or sacks, and said car and wheat upon it being entirely covered by a tarpaulin made of heavy canvas, and which tarpaulin entirely enclosed said wheat, and was securely fastened to said car at the sides and ends thereof so as to form a roof and sides and ends for the upper portion of said car, with the intent then and there to commit a misdemeanor therein."

A demurrer was interposed to the information on the ground that the facts charged did not constitute a crime. The court sustained the demurrer to the information, and the cause was brought to this court for review.

The question is, is the car or the structure on wheels described in the information a railroad car, such as was within legislative contemplation in § 7104, Bal. Code, where burglary is defined as follows: "Every person who shall unlawfully enter in the night time, or shall unlawfully break and enter in the day time, any dwelling house, or outhouse thereunto adjoining, and occupied therewith, or any office, shop, store, warehouse, malt house, still house, mill, factory, bank, church, school house, railroad car, barn, stable, ship, steamboat, water craft, or any building in which any goods, merchandise, or valuable things are kept for use, sale, or deposit, within the body of any county, with intent to commit a misdemeanor or felony, shall be deemed guilty of burglary," and the penalty is imprisonment in the penitentiary for any period not more than fourteen years. It is conceded that the car described in the information is the ordinary flat car which is used by railroad companies for the transportation of wheat. These cars are matters of common observation to people who have occasion to observe the freighting interests of the country by rail, the tarpaulin or cover being evidently not for the purpose of forming part of an inclosed structure, but principally to protect the grain from the inclemency of the weather, and possibly to assist in a measure in keeping the sacks on the car from shifting their places. These cars, it seems to us, do not come within the definition given by the statute, which evidently had relation to box cars, or some kind of a car that is inclosed so that an entry can be made. Under the ordinary understanding of the words

June 1903.] Opinion of the Court.—DUNBAR, J.

“break and enter” it is difficult to see how a person could break and enter a flat car loaded with wheat upon which a canvas is laid. The authorities cited by the appellant, it does not seem to us, are at all in point.

It is the contention of the appellant that the statutes of various states of the Union enlarge or modify the common-law definition of burglary until by codific evolution the species has been entirely lost, and that we have positive enactments which say certain acts are burglary, the word “burglary” being employed simply to give it a heinous character. The common-law definition of burglary is breaking and entering the dwelling house of another in the night time with intent to commit a felony. It is not true, we think, that by codific evolution the species has been entirely lost. While there has been an enlargement of the definition, the central idea which has obtained for hundreds of years, viz., the unlawful breaking and entering of some kind of an inclosed structure, has been retained, the statute finally dropping the element of breaking when the structure was unlawfully entered in the night time; and we do not think that it was the legislative intent to confuse the crimes of burglary and larceny, or substitute one definition for the other. It is no doubt true that the legislature has the power to denominate any kind of larceny, or for that matter any other crime, burglary; but in legislation on crimes the definitions of which have been so well and commonly understood as the crimes of burglary and larceny, the substitution will not be presumed unless the intention is manifest, as it is not in this case.

The demurrer was properly sustained, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY and MOUNT, JJ., concur.

[No. 4634. Decided June 27, 1903.]

KATE HORSFALL, *Respondent*, v. PACIFIC MUTUAL LIFE
INSURANCE COMPANY, *Appellant*.

ACCIDENT INSURANCE — INTERNAL INJURY CAUSED BY LIFTING HEAVY
WEIGHT.

A violent dilation of the heart, resulting in death, which was caused by the act of lifting a heavy weight in the course of business, falls within the provisions of an accident policy insuring against effect of bodily injuries caused solely by external, violent, and accidental means.

SAME — EXTERNAL MARKS.

Where the death of a strong, healthy man resulted from dilation of the heart, caused by lifting a heavy weight, the facts that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold and covered with perspiration, and the next day his skin, previously ruddy, became a bluish gray color and so remained until his death, constitute such visible, external marks of the injury as to bring the case within the terms of a policy providing against liability in case no external marks of injury appear.

SAME — NOTICE OF ACCIDENT — REASONABLE TIME — QUESTION FOR
JURY.

The provision of an insurance policy requiring immediate notice of an accident to be given to the company ordinarily means within a reasonable time; and, in an action for death, without any claim for weekly indemnity, the question of unreasonable delay was properly one for the jury, where notice was given twelve days after the death of the insured, which was thirty-seven days after his injury, under a policy providing for weekly indemnity and for a principal sum in case of death within ninety days, and that unless the claimant gives immediate written notice of any accident, with full particulars, and affirmative proof of death within ninety days from the time of death, all such claims shall be forfeited.

Appeal from Superior Court, Pierce County.—Hon.
WILLIAM H. SNELL, Judge. Affirmed.

F. R. Baker, for appellant:

The injury to the insured was not the result of accident within the meaning of the policy. *Feder v. Iowa State Traveling Men's Ass'n*, 78 N. W. 252 (43 L. R. A. 693); *Cobb v. Preferred Mutual Accident Association*, 22 S. E. 976; *Traveler's Ins. Co. v. Selden*, 78 Fed. 285.

The notice given the company in this case was not within such a reasonable time as to satisfy the condition for immediate notice contained in the policy. *Foster v. Fidelity & Casualty Co.*, 40 L. R. A. 833; *Mellen v. Hamilton Fire Ins. Co.*, 17 N. Y. 609; *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198; *Railway Passenger Ass. Co. v. Burwell*, 44 Ind. 460; *Edwards v. Lycoming County Mutual Ins. Co.*, 75 Pa. St. 380.

F. S. Blattner and Stiles & Doolittle, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Action to recover upon an accident insurance policy issued by appellant to John Horsfall during his lifetime. The respondent, Kate Horsfall, is the beneficiary under the policy in case of the death of the insured as the result of an accident covered by the policy. Plaintiff had judgment below, and defendant appeals.

The policy of insurance is in the usual form of accident insurance, and provides, among other things, for a weekly indemnity in case of injury from accident, and for a principal sum of \$1,200 to be paid to the wife of the insured in case of the death of the insured within ninety days from the happening of such accident. It also provides that, unless the claimant gives to the company immediate written notice of any accident, with full particulars and affirmative proof of death, within ninety days from the time of the death, all such claims shall be forfeited. It provides further: "This insurance does not

cover . . . injuries, or death resulting therefrom, of which injuries there are no visible external marks upon the body (the body itself not being considered such mark), produced at the time of and by the accident,” The insured was a man fifty-eight years old at the time of his death, a blacksmith by occupation, weighed about 175 or 180 pounds, and was a strong, healthy, robust man, capable of a lift of from 200 to 250 pounds without difficulty. On March 24, 1902, while at work in the shop of the Puget Sound Iron Works at Tacoma, he was called upon to assist in carrying a bar of iron one and one-half by four inches thick and about twenty-two feet long, weighing from 350 to 400 pounds. This bar of iron was lying on a pile of round, flat, and square iron close to the wall of the building, so that Mr. Horsfall was compelled to stand on top of the pile and reach below his feet in order to pick up the end of the bar. Another man had picked up one end of the bar, and Horsfall, by reason of his position, was at some disadvantage in picking up his end of the bar. He, however, picked up the end of the bar, and carried it to the anvil, where he laid it down, and immediately complained of being sick. He turned pale, trembled, grew cold, perspired profusely, and had to quit work. He went home and called a physician, who pronounced the trouble a violent dilation of the heart, causing hypertrophy, from which Mr. Horsfall died on April 18, 1902. Doctors, both for the plaintiff and for the defendant, testified that, under the circumstances of the lift, the lift itself, in their opinion, would cause the dilation of the heart. The appellant argues but one assignment of error, viz., “in denying appellant’s motion for judgment of nonsuit and dismissal at the close of plaintiff’s case.” It is urged in support of this assignment, (1) that the evidence fails to

show that the deceased met with an accident of any kind; (2) if he did meet with an accident, it was not such an accident as was covered by the policy; and (3) there was no immediate notice given as required by the policy of insurance.

1. The policy insured the deceased against the effect of bodily injuries "caused solely by external, violent, and accidental means." Death by accident is defined to be "death from any unexpected event, which happens as by chance, or which does not take place according to the usual course of things." So a sprain of the muscles of the back, caused by lifting heavy weights in the course of business, is injury by accident or violence 'occasioned by external or material causes operating on the person of the insured.'" 2 May, Insurance (4th ed.), § 514; *United States Mutual Accident Ass'n. v. Barry*, 131 U. S. 100 (9 Sup. Ct. 755); *North American, etc., Ins. Co. v. Burroughs*, 69 Pa. St. 51 (8 Am. Rep. 212); 1 Cyc. 248, and cases cited.

The evidence shows conclusively that the deceased was a strong and apparently healthy man of fifty-eight years, who had never been sick, and who was accustomed to lift from 200 to 250 pounds without difficulty; that immediately after he had made the lift of one end of the bar weighing from 350 to 400 pounds, he became sick and "deathly pale." His extremities became cold, and cold perspiration stood out on his face and hands. The exertion had caused a violent dilation of the heart. The result certainly was unexpected. It did not take place according to the usual course of things. If, instead of a sprain of the muscles of the heart, the deceased had sprained the muscles of his back, or arm, or ankle, it certainly could not have been reasonably claimed that the result was not due to accident. The fact that the heart was dilated or ruptured was none the less an accident, according to the usual

acceptation of the term, and according to the definition above given. We think the evidence shows an accident within the meaning of the policy.

2. It is also urged that the injuries causing death left no visible external mark, produced at the time of and by the accident, upon the body of deceased, and therefore the injury was one excepted from the policy. The evidence as stated above shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, and the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy. The rule is stated in 1 Cyc. 252, as follows:

“The external and visible sign or mark required by the proviso that the policy will not cover ‘any injury, fatal or otherwise, of which there is no visible mark upon the body,’ need not necessarily be a bruise, contusion, laceration, or broken limb; it may be any visible evidence of an internal strain. Nor is it necessary that such evidence be present immediately after the happening of the accident.”

United States Mutual Accident Ass’n v. Barry, supra; Thayer v. Standard, etc., Ins. Co., 68 N. H. 577 (41 Atl. 182); *Gale v. Mutual Aid, etc., Assn.*, 66 Hun, 600; *Menneiley v. Employers’ Liability Assur. Corp.*, 148 N. Y. 596 (43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716); *Pennington v. Pacific Mutual Life Ins. Co.*, 85 Iowa, 468 (52 N. W. 482, 39 Am. St. Rep. 306); *Whitehouse v. Travelers’ Ins. Co.*, 29 Fed. Cas. No. 17,566; *Union Casualty & Surety Co. v. Mondy*, (Colo.) 71 Pac. 677.

3. It is next claimed that the motion should have been

granted, because immediate notice of the accident was not given to the appellant as required by the policy. Immediate notice ordinarily means within a reasonable time and with due diligence under the circumstances of the particular case, of which the jury are ordinarily the judges. 2 May, Insurance (4th ed.), § 462; *Remington v. Fidelity & Deposit Co.*, 27 Wash. 429 (67 Pac. 989); *Western Commercial Travelers Ass'n v. Smith*, 85 Fed. 401 (40 L. R. A. 653).

No claim is made in this action for weekly indemnity under the policy. The evidence shows that the respondent caused notice to be sent to the appellant on the 12th day after the death of her husband. Until the death of her husband she was not a claimant under the terms of the policy. This was not an unreasonable delay, and therefore it was the duty of the court to submit the question of reasonable time to the jury, which was properly done.

Finding no error in the record, the judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4654. Decided June 27, 1903.]

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THE STATE OF WASHINGTON, *Respondent*, v. THOMAS H.
PITTAM, *Appellant*.

APPEAL — REVIEW — SUFFICIENCY OF OBJECTIONS.

A general objection to the admission of testimony that is material, relevant and competent will raise no question to be considered on appeal.

EVIDENCE — PAROL PROOF OF CORPORATE EXISTENCE.

Oral proof of the existence of a corporation by one having knowledge thereof is sufficient, when admitted without objection, although the statute may make a certified copy of the articles of incorporation *prima facie* evidence of the facts therein stated.

EMBEZZLEMENT — EVIDENCE — OTHER ACTS SHOWING GENERAL SCHEME.

In a prosecution for embezzling the funds of an employer, evidence of other acts of the defendant in giving receipts to patrons of his employer and making entries on the books for less amounts than the moneys received is admissible for the purpose of showing the general scheme he adopted in keeping his employer's accounts as tending to show a system employed on his part in furthering such embezzlement.

APPEAL — REVIEW OF EVIDENCE — DIMINUTION OF RECORD.

The question of the sufficiency of the evidence to sustain the verdict will not be considered on appeal, when the trial court has not certified that the record contains all the material evidence in the case.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

Harris Baldwin, for appellant:

Sections 4252 and 6043, Bal. Code, establish the method by which corporate existence may be proven. The opinion of Waggoner proved nothing but his opinion. The admission of this evidence was error. *Knapp, Burrell & Co. v. Strand*, 4 Wash. 686; *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501; *McAleer v. State*, 64 N. W. 358.

Horace Kimball, Prosecuting Attorney, and *R. M. Barnhart*, for the State:

The sections quoted and the cases cited by appellant provide and hold simply that certified copies of certain instruments shall be considered *prima facie* evidence of the facts therein stated. Nowhere does the law provide that other proof of the incorporation may not be received. *Edelhoff v. State*, 36 Pac. 627. In a criminal case, if it becomes necessary to prove the existence of a corporation, a showing that it is a *de facto* corporation existing under the name alleged in the information, or that it is generally

reputed to be such corporation, will be sufficient. *Reed v. State*, 15 Ohio, 217; *State v. Thompson*, 23 Kan. 338 (33 Am. Rep. 165); *Calkins v. State*, 18 Ohio St. 366 (98 Am. Dec. 121); *Smith v. State*, 28 Ind. 321; *Braithwaite v. State*, 28 Neb. 832; *People v. Leonard*, 39 Pac. 617; *People v. Ward*, 66 Pac. 372.

The question of defendant's intent was in issue, and testimony concerning other offenses committed by defendant, which were a part of the same system and scheme to defraud, were admissible to characterize and give color to the particular act for which he was then on trial, and to show his intent with reference to the act under investigation. *People v. Gray*, 5 Pac. 240; *Commonwealth v. Tuckerman*, 10 Gray, 173; *People v. Nevce*, 24 Pac. 1091; *People v. Bidleman*, 38 Pac. 502; *People v. Ward*, 66 Pac. 372; *Territory v. Meyer*, 24 Pac. 183.

The opinion of the court was delivered by

DUNBAR, J.—The appellant was tried and convicted on an information filed against him under the provisions of § 7119, Bal. Code. The information charged him with wilfully, unlawfully, feloniously, and fraudulently converting to his own use the money and property intrusted to him by the McCormick Harvesting Machine Company, a corporation, while he was acting as agent for said company. The errors alleged on this appeal are: (1) Allowing the state, over the objection of the appellant, to prove by oral testimony that the McCormick Harvesting Machine Company was a corporation; (2) permitting the state, against the objection of the appellant, to adduce against the appellant at the trial evidence of other offenses. The third assignment is in substance that the evidence does not warrant the verdict. As to the first assignment, E. F. Waggoner, testified on direct examination as follows:

"Q. You may state what the nature of that company is, as being a company or corporation. A. It is a corporation existing under the laws of the state of Illinois. Q. Doing business in the state of Washington? A. Yes, sir. Mr. Baldwin: I object to proving the corporation in that way. Objection overruled."

It will be seen that the objection is very general, but that the testimony went in without objection of any kind, that no further testimony of that character was introduced after the objection, and that there was no motion or request made by the appellant to strike the testimony. So that we think, under the circumstances as shown by the state of the record, that this objection is not available to the appellant. However, the testimony most certainly was material, relevant and competent. It is true the law provides that certified copies of certain instruments shall be considered *prima facie* evidence of the facts therein stated, but there is no provision of the law excluding other proof of the existence of the corporation. Proof of the *de facto* existence of a corporation under the name alleged in the information is admissible, and in some jurisdictions the existence of the corporation is proven by any one having knowledge of its existence, or even by general reputation.

The argument on the second assignment is as follows: "The trial court, over the objection of the appellant, allowed the witness F. D. Banks to testify as to other offenses which the witness said the appellant had committed. (Statement of Facts, pp. 40-70.) This was error." The particular testimony is not pointed out nor mentioned by the appellant, and no further comment is made on its admission, except the citing of *State v. Bokien*, 14 Wash. 403 (44 Pac. 889). A perusal of the record, however, shows (what we presume are the facts referred to by the appellant) that the state proved that the defendant, the

agent and cashier of the corporation, who transacted its business and kept its books, had given receipts to one Nuzum and other patrons of the corporation, and that the entries which he had made in the books were of less amount than the money received. It is a well-established rule that it is not competent to show the commission by the defendant of other distinct crimes for the purpose of proving that he is guilty of the crime charged; but, for the purpose of construing the actions or of ascertaining the intent of the defendant in the commission of the acts proven, other independent culpable acts are sometimes admissible in evidence. In this case, for instance, the defendant admitted having received the \$150 which he is charged with embezzling, the circumstances being that he took to the bank for deposit a check in favor of the corporation for \$343.19, informing the teller that he desired \$150 of the amount in cash, the remainder to be placed to the credit of the corporation; but he disclaimed any intent to wrongfully appropriate said amount of \$150. We think it was competent to show that, in the general scheme he adopted in keeping his accounts with his employer, the result was the appropriation by him of the funds of the employer; not for the purpose of prejudicing a jury against him by proving the commission of independent crimes, but to throw light on his intentions in the perpetration of the particular transaction constituting the crime charged. Mr. Wharton, in his work on Criminal Evidence (9th ed.), § 31, after stating the general rule, under the head of "Exceptions" to such rule, says:

"When an extraneous crime forms part of the *res gestae* evidence of it is not excluded by the fact that it is extraneous. Thus, on a trial for murder, evidence that the prisoner, on the same day the deceased was killed, and shortly before the killing, shot a third person, was held admissible,

under the circumstances of the case, notwithstanding the evidence tended to prove a distinct felony committed by the prisoner; such shooting, and the killing of the deceased, appearing to be connected as parts of one entire transaction. On a trial, also, for breaking into a booking office of a railway station, evidence was admitted that the prisoners had, on the same night, broken into three other booking offices of three other stations on the same railway, the four cases being connected. . . . In order to prove purpose on the defendant's part, system is relevant, and in order to prove system, isolated crimes are admissible from which system may be inferred. If the evidence is admissible on other grounds, it cannot be excluded because it charges the defendant with an extraneous crime."

In this case we think that the evidence tended to prove a system or scheme on the part of the defendant to defraud the corporation by embezzling its funds, and that the evidence introduced was competent.

The third assignment is without merit, and we also think that not only was the testimony sufficient to warrant the verdict and sustain the judgment, but, if it was not, that there is no sufficient certificate of the court to justify this court in reversing a judgment on the facts, the court not certifying that the record contains all the material evidence in the case.

No reversible error appearing, the judgment is affirmed.

FULLERTON, C. J., and ANDERS, HADLEY and MOUNT, JJ., concur.

[No. 4720. Decided July 1, 1903.]

THE STATE OF WASHINGTON *on the Relation of George
Roberts* v. SUPERIOR COURT OF KING COUNTY.

HABEAS CORPUS — APPEAL — NECESSITY FOR BOND.

Proceedings in habeas corpus being of a civil, and not of a criminal, nature, an appeal from an order remanding the applicant to custody would be ineffectual as a stay of proceedings, where no appeal bond had been filed within five days after notice of appeal, as required in civil actions by Bal. Code, § 6505.

SAME — RESTRAINING ACTION OF COURT PENDING APPEAL — PRESUMPTIONS ARISING FROM ISSUANCE OF ALTERNATIVE WRIT OF PROHIBITION.

The fact that an alternative writ of prohibition restraining the trial court from remanding an applicant for habeas corpus to custody was issued within five days after an appeal was taken from such order would not raise a presumption in favor of the regularity of the appeal, when the uncontroverted answer to such alternative writ shows that a bond had not been given within five days after notice of appeal, as required by statute.

Original Application for Prohibition.

Henry D. Allison and *James L. Crotty*, for relator.

W. T. Scott, Prosecuting Attorney, and *Elmer E. Todd*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Original application was made in this court for a writ of prohibition directed to the superior court of King county, and to the Honorable W. R. Bell, one of the judges thereof. The affidavit in support of the application recites substantially that, on the 23d day of May, 1903, the relator was arrested by one Thomas L. Ryan, acting as agent for the state of California, said arrest having been made under the authority of an execu-

tive warrant issued by the governor of this state, upon the demand of the governor of the state of California, for the surrender and delivery of the person of the relator to said Ryan, agent as aforesaid, upon the ground that the relator is a fugitive from justice of the state of California, and is charged with the crime of grand larceny in said state; that upon said date the relator applied to said court and to said judge for an order directing the issuance of a writ of habeas corpus; that said order was made, and such writ was issued, commanding the said Ryan to have and produce the body of the relator before said court and said judge; that upon the same date the said judge issued an order for the arrest of the relator, based upon an affidavit that the said Ryan would disobey the writ of habeas corpus, and would secretly and forcibly remove the relator from the state of Washington, and without the jurisdiction of said court, before the hearing could be had in the habeas corpus proceeding; that by authority of such order the relator was thereupon arrested by the sheriff of King county, and confined in the jail of said county until May 28, 1903, when he was brought before said judge, who thereupon proceeded to hear and determine the habeas corpus proceeding; that upon said hearing the said judge entered a final order denying the petition and dismissing the proceeding; that from such order and judgment the relator at once gave notice in open court of an appeal to this court; that upon taking such appeal the relator applied to said judge for an order staying further proceedings until said appeal can be heard and determined in this court, and, further, that the relator be remanded to the custody of the sheriff of King county to be held and confined in the jail of said county, and that he be not removed from the jurisdiction of said court pend-

ing said appeal; that said judge refused to make such order and threatened to make, and is about to make, an order remanding the relator to the custody of said Ryan, as agent for the state of California, and is about to make an order permitting the said Ryan to remove the relator to the state of California and without the jurisdiction of said court; that, unless a writ of prohibition shall issue, such order will be made, and the relator will be denied the practical benefits of his appeal to this court.

Upon the filing and presentation of the affidavit substantially as stated above, this court directed the issuance of an alternative writ of prohibition, and the writ was accordingly issued. The respondent answered the alternative writ of prohibition, alleging that said Ryan, as respondent in said habeas corpus proceeding, made return therein that he held the relator in custody by virtue of a governor's warrant as aforesaid; that at the final hearing he produced before this respondent, as judge aforesaid, said governor's warrant, together with duly authenticated copies of the information filed against the relator by the district attorney of the city and county of San Francisco, California, and of the appointment of said Ryan, as agent of the state of California, to receive the relator as a fugitive from justice; that by reason of the appearance of said facts, the extradition proceedings appearing to be regular, the respondent denied the application for a writ of habeas corpus, and dismissed said proceedings; that thereupon the relator in open court prayed an appeal as aforesaid; that more than five days have elapsed since said appeal was taken, but the relator herein, as appellant in that proceeding, has filed no appeal bond as required by law; that respondent did refuse to sign an order staying further proceedings in said cause, and did refuse to

remand the relator to the custody of the sheriff of King county.

The above is a substantial statement of the issues upon which a hearing was had in this court. It will be seen that the sole question presented relates to the duty and power of the respondent to remand the relator to the custody of the said agent of the state of California pending the appeal from said judgment. Does an appeal from a judgment denying an application for a writ of habeas corpus become effectual without the filing of an appeal bond within five days after the appeal is taken? If a habeas corpus proceeding is a criminal proceeding, then, under our statute, no bond is required to make an appeal therein effectual. In *State v. Fenton*, 30 Wash. 325 (70 Pac. 741), this court said:

“A habeas corpus proceeding cannot be said to be a criminal action, for, while it is frequently invoked by criminals or persons charged with crime, it is not a criminal action, so far as the parties to the cause are concerned. Its office is to inquire into the legality of the custody of the applicant, and sometimes the applicant is charged with crime; but it is frequently sued out for the purpose of determining the proper care and legal custody of children and is in no sense criminal in its application.”

The following cases are to the effect that habeas corpus proceedings are in their nature civil proceedings: *Ex parte Tom Tong*, 108 U. S. 556 (2 Sup. Ct. 871); *In re Van Sciever*, 42 Neb. 772 (60 N. W. 1037, 47 Am. St. Rep. 730); *Henderson v. James*, 52 Ohio St. 242 (39 N. E. 805, 27 L. R. A. 290); *Kurtz v. Moffitt*, 115 U. S. 487 (6 Sup. Ct. 148); *Cross v. Burke*, 146 U. S. 82 (13 Sup. Ct. 22); *People ex rel. Campbell v. Dewey*, 50 N. Y. Supp. 1013; *In re Reynolds*, 20 Fed. Cas. 592 (No. 11, 721); *In re Borrego*, 46 Pac. (New Mex.), 211.

In *Ex parte Tom Tong, supra*, at pages 559, 560, Chief Justice WAITE said:

"The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary, because of what is done to enforce laws for the punishment of crimes, but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act. Proceedings to enforce civil rights are civil proceedings, and proceedings for the punishment of crimes are criminal proceedings. In the present case the petitioner is held under criminal process. The prosecution against him is a criminal prosecution, but the writ of habeas corpus which he has obtained is not a proceeding in that prosecution. On the contrary, it is a new suit brought by him to enforce a civil right, which he claims, as against those who are holding him in custody, under the criminal process. If he fails to establish his right to his liberty, he may be detained for trial for the offense; but if he succeeds he must be discharged from custody. The proceeding is one instituted by himself for his liberty, not by the government to punish him for his crime. This petitioner claims that the Constitution and a treaty of the United States give him the right to his liberty, notwithstanding the charge that has been made against him, and he has obtained judicial process to enforce that right. Such a proceeding on his part is, in our opinion, a civil proceeding, notwithstanding his object is, by means of it, to get released from custody under a criminal prosecution."

The above quoted language of the learned chief justice clearly defines the office of the writ of habeas corpus and the nature of the proceeding to obtain it. In the light of such eminent authority together with other authorities cited above, it must be held here that the habeas corpus proceeding instituted by relator in the superior court is a civil proceeding, and that the appeal from the judgment

therein must be governed by the law relating to civil proceedings. Section 6505, Bal. Code, provides as follows:

“An appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section 6506, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. But no bond or deposit shall be required when the appeal is taken by the state, or by a county, city, town or school district thereof, or by a defendant in a criminal action.”

No bond having been filed within five days from the date of taking the appeal, and since it is in a civil proceeding, the appeal therefore became “ineffectual for any purpose.” If it is ineffectual for any purpose, it does not stay proceedings under the judgment from which the appeal is sought.

The relator, however, contends that since the alternative writ of prohibition was issued within five days from the date of taking the appeal, the record therefore shows an actual appeal pending, and that nothing appears in the application and alternative writ to negative the fact that an appeal bond may have been filed within five days. It is further insisted that this matter must be determined upon the conditions as they existed at the time the alternative writ was issued. The answer to the alternative writ was verified and filed more than five days after the appeal was taken, and it alleges that no bond was filed within the five days, which fact is not controverted by the relator. The effect of relator's position is therefore to ask this court to issue a permanent writ of prohibition commanding the respondent to refrain from doing a thing which from the record before us is now manifestly beyond

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Syllabus.

his power to do, since the appeal is now clearly ineffectual to stay proceedings. This would lead to an absurd result, and the position of relator cannot be entertained.

The writ is denied.

MOUNT, ANDERS and DUNBAR, JJ. concur.

[No. 4588. Decided July 2, 1908.]

W. L. THOMPSON, *Appellant*, v. W. D. ROBBINS, *Respondent*.

SUMMONS — SERVICE BY PUBLICATION — SUFFICIENCY.

Where the statute regulating service of summons by publication provides that such summons shall direct the defendant "to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action," a summons which requires the defendant "to appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action," would not confer jurisdiction upon the court to render judgment.

SAME — SETTING ASIDE DEFAULT — APPEALABLE ORDER.

Under Bal. Code, §4880, which provides that, if the summons is not served personally on the defendant in certain cases, he may be allowed to defend within one year after the rendition of judgment, an order setting aside a default and vacating a judgment entered in such a case would not be an appealable order, since such action is not the grant of a new trial, which is made appealable under subd. 6 of Bal. Code, §6500, nor can the right of appeal be claimed under subd. 7 of the same section authorizing appeal from any final order made after judgment, inasmuch as a void judgment could not give the appellant any substantial right capable of being affected by the action of the court.

Appeal from Superior Court, Asotin County. Hon. CHESTER F. MILLER, Judge. Appeal dismissed.

Sturdevant & Bailey, for appellant.

Charles L. McDonald, for respondent.

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The opinion of the court was delivered by

ANDERS, J.—This was an application under the revenue act of March 15, 1897, to the superior court of Asotin county, for a judgment foreclosing a lien for taxes on certain described lands situate in said county and belonging to the respondent. The plaintiff (appellant here) based his right of action on certain delinquent tax certificates issued by the county treasurer in accordance with the statute. The application was duly filed, and summons issued and placed in the hands of the sheriff for service, who stated in his return that the defendant could not be found in said county. An affidavit was then filed setting forth the facts necessary to authorize the service of the summons by publication, and thereupon the summons was published six times in the Asotin Sentinel, a weekly newspaper published in said county, the date of the first publication being February 23, 1901, and of the last publication March 30, 1901. No appearance having been made in the proceeding by or on behalf of the defendant, the court, on April 8, 1901, entered a decree foreclosing the lien, and directing a sale of the land for the payment of the taxes levied thereon, together with the statutory penalty, interest, and costs. Thereafter, on April 27, 1901, the lands described in the complaint were sold by the county treasurer, in pursuance of the order of the court, and in the manner provided by law, to the plaintiff herein, and afterwards the said treasurer duly executed and delivered a deed to the plaintiff and appellant. Subsequently, and within one year after the rendition of the decree of foreclosure, the defendant, Robbins, filed in the superior court of Asotin county, and served on the attorney for plaintiff, a motion to open the default judgment and to be permitted to answer

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Opinion of the Court—ANDERS, J.

and defend the action. This motion was made on the ground that no summons had been served on the defendant, and on the further ground that he had a good and valid defense to the action, said motion being based on the records and files in the cause and the affidavit of defendant. The plaintiff demurred to the motion on the ground that it did not state facts sufficient to entitle the defendant to the relief prayed for. The demurrer was overruled, and the motion sustained. The ruling of the court in sustaining the defendant's motion seems to have been predicated upon the fact, appearing of record, that the judgment and decree of foreclosure was rendered and filed before the expiration of the time within which the defendant had the right to appear and answer. The summons which was published in the foreclosure proceeding required the defendant to "appear within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action or pay the amount due, together with the costs," etc. This summons was not in accordance with the statute, and its publication did not confer upon the court jurisdiction to render the judgment which was entered in the foreclosure proceeding. And the judgment was therefore not merely irregular, but void.

The revenue act above mentioned, upon which this proceeding was based, as well as the general statute, provides that a summons to be served by publication shall direct the owner of the property subject to the tax lien "to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due." Bal. Code, § 1751; Id., § 4877. It will be observed that the summons prescribed by law fixes a certain time for the appearance of the defendant, whereas the summons as pub-

lished in this case designated the time within which the defendant was required to appear and "defend the action or pay the amount due" as sixty days after the service of the summons upon him, thus leaving it indefinite and uncertain as to the time within which he was required to enter his appearance in the proceeding. It is the general, if not the universal, rule that "the right to serve process by publication being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction upon the court." 17 Enc. Pl. & Pr. 45.

The respondent moves to dismiss the appeal for the reason that the order complained of is not subject to review by this court. This motion must be sustained. The statute (Bal. Code, § 4880) provides that if the summons is not served personally on the defendant in certain cases, of which this is one, the defendant may be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just; and the order of the court setting aside the default and vacating the judgment entered thereon, and granting the respondent leave to file an answer, was clearly authorized by that section of the statute. Indeed, neither the power of the court in the premises, nor the method pursued by the respondent to accomplish the object sought by him, is questioned by the learned counsel for appellant, their contention being that the service of the summons was irregular, but not void, and that no sufficient showing was made by respondent to warrant the action of the court. But these are all matters pertaining to the merits of the proceeding, and a discussion of them is unnecessary in view of our conclusion as to the merits of the motion to dismiss the appeal. No reply brief has been filed, and no argument has been made by appellant in this court upon the motion under consideration.

In *Freeman v. Ambrose*, 12 Wash. 1 (40 Pac. 381), the superior court, as in this case, set aside a default and the judgment entered thereon, and granted the defendant leave to file an answer. The plaintiff appealed, and, in response to a motion to dismiss, insisted that the order of the lower court in effect granted a new trial, and was therefore appealable under subd. 6 of § 1 of the act (Laws 1893, p. 119; Bal. Code, § 6500) which provides that an appeal may be taken from an order which grants a new trial. But this court there held, after quoting the statute defining a new trial, that setting aside a default judgment and giving a defendant leave to file an answer and defend is not the granting of a new trial within the meaning of the statute. That case is strictly in point here, and the rule there announced was approved in *Reitmeir v. Seigmund*, 13 Wash. 624 (43 Pac. 878), and several subsequent cases. It may be suggested, however, that, in any event, the order in question is appealable under and by virtue of subd. 7 of the above mentioned section of the statute, which provides that an appeal may be taken "from any final order made after judgment, which affects a substantial right." But, in our opinion, that provision is not applicable to the case at bar. No substantial right, or any right, of the appellant was affected by the order appealed from, for the simple reason that no right can be based upon a judgment entered without jurisdiction of the person of the defendant, or, in other words, where the defendant has not been properly served with a valid summons.

The appeal is dismissed, and the cause will proceed to trial in accordance with the statute governing such proceedings.

FULLERTON, C. J., and MOUNT, HADLEY and DUNBAR, JJ., concur.

[No. 4664. Decided July 2, 1903.]

THE STATE OF WASHINGTON *on the Relation of P. J. Hennessy et al., v. THAD HUSTON, Judge of the Superior Court of Pierce County.*

JUDGMENTS — VACATION — IRREGULARITY.

Where no challenge to the sufficiency of a complaint had been interposed by defendant, a judgment of dismissal on the ground of its insufficiency, made by the court upon its own motion upon the hearing of an interlocutory motion, while issues of fact were pending for determination, was such an irregularity as to afford ground for the vacation of the judgment, under Bal. Code, § 5153, which authorizes vacation for "irregularity in obtaining the judgment or order."

SAME — APPEAL — OBJECTION MUST BE URGED BELOW.

Irregularity in the entry of a judgment cannot be urged as error on appeal, until after motion to vacate it on that ground has been interposed in the lower court.

SAME — TIME FOR FILING STATEMENT OF FACTS.

The time for appeal from a judgment irregularly entered will not begin to run pending the determination by the trial court of a motion for its vacation, and hence the period for filing a statement of facts will be postponed until such motion is disposed of.

SAME — SUFFICIENCY OF MOTION.

A motion to vacate and set aside a judgment reciting "that this action be, and the same is hereby, dismissed at the plaintiff's costs," is broad enough to authorize the vacation of another portion of the same judgment reciting "that there is no equity in the complaint, and that the equities of this cause are with the defendants," where the latter recital is merely the conclusion of law upon which the dismissal was based.

Original Application for Mandamus.

T. L. Stiles and E. L. Parsons, for relators:

The time for appealing from a judgment of dismissal irregularly entered does not run while the motion to vacate is pending and held under consideration by the court.

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Aspen Mining & Smelting Co. v. Billings, 150 U. S. 81 (37 L. ed. 986); *Brockett v. Brockett*, 2 How. 240 (11 L. ed. 251); *Memphis v. Brown*, 94 U. S. 715 (24 L. ed. 244); *Voorhees v. Noye Mfg. Co.*, 151 U. S. 135 (38 L. ed. 101); *Andrews v. Thum*, 64 Fed. 149; *Adrian Furn. Mfg. Co. v. Lenawee Circuit Judge*, 52 N. W. 615; *Maxwell v. Martin*, 14 S. E. 7; *Needham v. Salt Lake City*, 26 Pac. 920; *Williams v. Jones*, 69 Ga. 757.

Fogg & Fogg, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Original application is made in this court for a writ of mandate directed to the superior court of Pierce county and to the Honorable Thad Huston, one of the judges thereof. The petition recites, substantially: That on or about the 16th day of January, 1902, the petitioners commenced an action in said court, in which the Tacoma Smelting & Refining Company, a corporation, and others, were defendants; that at the time of filing their complaint in said action they applied to the respondent, one of the judges of said court, for a temporary restraining order, and that such order was thereupon duly made by respondent in said cause; that on the same date the relators filed in said cause their motion for the appointment of a receiver of the lands and estate of said Tacoma Smelting & Refining Company; that thereafter issues were joined under said complaint and a supplemental complaint by answers and replies; that on the 24th day of February, 1902, said cause came on for hearing before the respondent upon said motion for the appointment of a receiver, and upon said temporary restraining order, and the order to show cause why the same should not be continued in force until the final determination of said action;

that at the conclusion of such hearing said matters were by respondent taken under advisement until the 6th day of March, 1902, when said court, through the respondent, announced its decision and entered judgment as follows:

"This cause came on for hearing on this February 24th, 1902, upon the order heretofore made on the 16th day of January, 1902, and upon the pleadings and evidence adduced; and, after listening to the evidence adduced by the respective parties and arguments of counsel, the case was taken under advisement until this 6th day of March, A. D. 1902. The court, being well advised in the premises, finds that there is no ground for the appointment of a receiver, or for an injunction, and that there is no equity in the complaint, and that the equities of this case are with the defendants.

"It is therefore ordered, adjudged, and decreed by this court that plaintiffs' application for receiver and for an injunction is overruled and denied, and that this action be, and the same is hereby, dismissed at plaintiffs' cost.

"To all of which plaintiffs duly excepted, and their exceptions are allowed."

That no demurrer, motion, or other pleading was at any time served or filed in said cause by any of the defendants therein, except as hereinbefore stated, and that said judgment of dismissal was entered by the respondent of his own motion, without any other or different hearing, opportunity for hearing, or consideration of said cause than as hereinbefore stated; that no trial or opportunity for trial of the issues raised by the pleadings of the respective parties was at any time had; that thereafter, on the 12th day of March, 1902, these relators, as plaintiffs in said cause, served and filed their motion to vacate said judgment; that on March 19, 1902, said motion to vacate came on for hearing before the respondent, and after argument by counsel was taken under advisement by respondent until January 2, 1903, when the same was denied by

July, 1903.] Opinion of the Court—HADLEY, J.

order entered of that date; that on the 20th day of January, 1903, the relators filed their notice of appeal in said cause. It is further stated that on said 20th day of January, 1903, the relators duly filed their proposed statement of facts, and thereafter the said defendants filed their proposed amendments thereto; first, insisting that the court was without jurisdiction to settle and certify the proposed statement; and, second, that it be amended by striking out the whole thereof; that the cause came on for hearing upon application to settle and certify said proposed statement of facts, and that the respondent refused to certify the same. The order entered upon the court's refusal to certify the statement contains findings to the effect that all the evidence, papers, matters, and proceedings contained in the proposed statement relate solely and only to matters and proceedings therein alleged to have occurred, and to have been introduced in evidence and considered by the court at the time of the hearing and rendition of the judgment of March 6, 1902; that the proposed statement was not filed or served until more than ten months after the rendition of said judgment, and hence, with respect to said judgment, was filed and served too late, and not within the time limited by law; that no evidence of any kind or character was at any time offered, introduced, or considered with respect to the motion to vacate said judgment, or the order thereon entered January 2, 1903, and said order was not made or based on any evidence whatever; that if there had been any evidence offered in support of said motion, or upon which said order of January 2, 1903, was made, the court would be ready and willing to certify a statement of facts embodying the same, but inasmuch as there was no such evidence, or any evidence in that behalf, there is nothing to be certified.

The above are the essential facts shown by the petition, and upon which a peremptory writ of mandate is sought to compel respondent to sign and certify said proposed statement of facts. At the hearing here the affidavit of respondent was submitted to the effect that the journal and judgment entries set out in the petition are correct transcripts of the record; that on the 24th day of January, 1902, the cause came on for hearing upon the order made January 16, 1902, and upon the pleadings and the evidence adduced, and after hearing and considering the same respondent decided, as shown by his written opinion, which is a part of the record and made a part of the petition herein, that the facts stated in the bill were not sufficient to entitle plaintiffs to relief and that there was no equity in the bill. In the written opinion it was also directed that the bill be dismissed. Respondent's affidavit further states: That after said decision was handed down the said plaintiffs made no motion for leave to amend their pleadings, and no leave to amend was granted, but that plaintiffs elected to stand upon their complaint and supplemental complaint without amendment; that thereupon the final judgment of March 6, 1902, was entered; that no motion for new trial or for a rehearing was ever made; that after the expiration of the time within which a motion for new trial might have been filed, said plaintiffs filed their motion to vacate and set aside the following words of the judgment entry, to-wit: "That this action be, and the same is hereby, dismissed at plaintiffs' costs;" that the motion was not supported by any affidavit or other evidence, and did not purport to raise any issue of fact, but purported to raise an issue of law to the effect that as a matter of law the court had erred in dismissing the bill; that the motion left the entire remainder of the

July, 1903.] Opinion of the Court—HADLEY, J.

then final judgment as it stood and without attack; that is to say, it left without complaint or attack the adjudication that there was no equity in the bill, that no cause of action was stated in the complaint, and that the equities of the case were with the defendants; that, upon plaintiffs' proposed statement of facts being submitted, respondent found they were attempting to prosecute two appeals; first, an appeal from certain words of the final judgment of March 6, 1902, reading as follows: (a) From that portion reading, "That there is no equity in the complaint, and that the equities of this case are with the defendants;" (b) from that part reading, "That this action be, and the same is hereby, dismissed at plaintiffs' costs;" second, an appeal from the order of January 2, 1903, overruling the motion to vacate. Respondent's affidavit further states the reasons for refusing to certify the statement of facts as outlined in the order entered at the time of the refusal, and which have been hereinbefore stated.

It is the contention of relators, first, that the judgment of dismissal entered March 6, 1902, was an irregular judgment, in that the court entered the judgment of its own motion after issue joined under the pleadings, and without any hearing of the issues so joined; second, that before the plaintiffs in said action could have appealed from said judgment of dismissal they were obliged to first call the attention of the trial court to the error complained of by motion to vacate the judgment and to secure a ruling upon such motion; third, that the time for appealing from said judgment of dismissal did not run while the motion to vacate was pending and held under consideration by the court; fourth, that the appeal from the order denying the motion to vacate the judgment brings up for consideration the judgment itself; fifth, that therefore

the proposed statement of facts was filed in time, and should be certified by the trial judge.

It will be observed that the motion upon which the order of January 2, 1903, was entered cannot be treated as an ordinary motion for a new trial, since it does not purport to be such, and in any event was not filed within the time limited by law for filing motions for new trials. It must, therefore, be treated as a proceeding under the statute for the vacation of the judgment of March 6, 1902. Section 5153, Bal. Code, enumerates the grounds upon which such a proceeding may be based. If the judgment sought to be vacated is an irregular one, as contended by relators, it must come within the description of subd. 3 of the above cited section, which is as follows: "For mistakes, neglect, or omission of the clerk, or irregularity in obtaining the judgment or order." It cannot be said that there was any irregularity here, because of "mistakes, neglect, or omission of the clerk," and if any portion of the statute is applicable, it must be the somewhat indefinite words, "irregularity in obtaining the judgment or order." Was there such irregularity in obtaining this judgment as is comprehended by the above statute? The hearing upon which the judgment was entered was upon an application to appoint a receiver in the cause, and also for the continuance pending the action of the temporary restraining order theretofore issued. But the issues had already been joined by the complaint, supplemental complaint, answers thereto, and replies. The hearing was therefore in the nature of an interlocutory one, which may be said to have been merely auxiliary to the main issues, and was not a final hearing on general testimony submitted under the issues joined in the pleadings. The judgment which was entered, being one of dismissal, was final in its nature, and was intended to conclude and determine all matters

involved in the action. This we believe was an irregularity. The complaint had not been attacked by demurrer or motion, and no issue of law was raised thereon, except as it was raised by the interlocutory proceedings. The respondent states in his affidavit that it was his view that he was authorized to pass upon the sufficiency of the complaint, whether it was challenged by demurrer or not. Granting that to be true, as a general proposition, yet, without a pleading which raised its sufficiency as an issue of law, it would seem that, with issues of fact joined, the question of its sufficiency would not arise for determination until it became involved by offered testimony at the final trial under the main issues. In *Kuhn v. Mason*, 24 Wash. 94, 99 (64 Pac. 182), this court, when speaking of such irregularities as are contemplated by the statute, said:

“Irregularities which are generally invoked for the purpose of vacating a judgment, and which will justify a vacation of the judgment after term time, are where a judgment was entered in favor of the plaintiff before the time for answering had expired, or where the judgment was entered while there was an answer or demurrer on file and not yet disposed of, and other irregularities of this character.”

We believe, therefore, that the question of law arising upon the sufficiency of the complaint was prematurely determined, there being nothing to challenge that sufficiency until the issues of fact came on to be heard, and that the judgment of dismissal based thereon was for that reason irregularly entered, within the meaning of the statute.

Having determined that the judgment was irregular, the next question for examination is whether an appeal lies directly from such a judgment, without calling the at-

tention of the trial court to the irregularity and thus giving an opportunity for its correction. In *Belles v. Carroll*, 6 Wash. 131 (32 Pac. 1060), this court held that where a judgment has been irregularly entered against a defendant by default, he should seek a remedy by motion in the court below to set aside such judgment before appealing to this court. The court refused to enter into an investigation of the merits or to affirm the judgment, but simply dismissed the appeal; so that there should be no interference with the right of the appellants to move against the judgment in the lower court. To the same effect is the case of *Pacific Supply Co. v. Brand*, 7 Wash. 357 (35 Pac. 72). An appeal was sought directly from a judgment dismissing an action for want of prosecution. No motion was made to set aside the judgment. The court held that, with the record in that condition, the appeal should be dismissed. The principle here under examination was directly involved in *Poock v. Lafayette Bldg. Ass'n*, 71 Ind. 357. In that case the court rendered final judgment against all the defendants after issues of fact were joined as to one defendant, but without a hearing under said issues. The court held that the objection to the judgment as to the one defendant, which was entered without a hearing, was well taken; but, as no motion was made below to set aside the judgment, the question could not be raised in the first instance in the supreme court. The rule followed in the above case, and in our own cases cited, seems to be reasonable and right in the case of an irregular judgment. In many such cases judgments might be entered inadvertently, and without the court's attention being in any manner directed to the irregularity. In such event it is manifestly fair that a rule shall obtain making it necessary to move against the irregularity

in such a manner as to challenge the court's attention to it before an appeal will lie. It should be remarked in passing, however, that the motion to vacate does not take the place of an appeal in ordinary cases. It is not the province of such motion to secure a re-trial of an issue of fact or law which has been once regularly submitted and determined by the trial court, and the only remedy in such cases is by appeal. But, where there has not been a regular submission of such issues, a condition arises which seems to make the rule above discussed a whole-some and just one. Under such rule an appeal did not lie directly from the judgment of dismissal in question before the interposition of the motion to vacate.

The motion against an irregular judgment being a necessary preliminary to an appeal from the judgment, we are next to inquire when the time for appeal and for filing a proposed statement of facts in support of such appeal begins to run. It seems logically to follow that it must begin to run when the motion to vacate has been determined by the court. Otherwise, the relief intended by the statute against such irregularity would be burdensome and often impracticable. If such were not the rule, then in all such cases a proposed statement would have to be prepared and filed within the usual thirty days, or extended period of ninety days, notwithstanding the statute affords the means of relief against the judgment at any time within one year, which may possibly render a statement of facts and an appeal unnecessary. The respondent cites this court to a number of its decisions where it has held that the proposed statement of facts must be filed within thirty days, or within ninety days, by extension of time under the court's order, and that the utmost limit of time within which it can be filed is ninety days

after the date of final judgment. The cases cited, however, relate to final judgments regularly entered, and were, therefore, not governed by the rule herein discussed relating to irregular judgments.

It is urged by respondent that the motion to vacate attacked only the few words of the judgment which purported to dismiss the action, and left without attack that portion of it which determined that the complaint did not state a cause of action and that the equities were with the defendants. The portion attacked was, however, the active and vital part of the judgment; the judgment itself, in fact, since the remaining words were but the statement of a conclusion of law. With the portion attacked vacated, there would have still been a cause of action pending which could have been finally and regularly heard, at which time the court's view of the law as applied to the complaint under offered evidence would have become vital and active, and might then have regularly entered into a final judgment. We think the motion was, therefore, sufficiently broad upon which to base a vacation of the judgment.

For the reasons herein assigned, we believe the relators are entitled to have their proposed statement of facts certified, and it is ordered that the writ shall issue.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

July, 1903.] Opinion of the Court—HADLEY, J.

[No. 4727. Decided July 6, 1903.]

A. W. HIGHT, *Appellant*, v. WILLIAM BATLEY *et al.*, *Appellants*.

APPEAL — RIGHT OF INTERVENTION.

Application to intervene in a cause upon appeal comes too late, under Bal. Code, § 4846, which provides that applications for intervention must be made before trial.

SAME — SUBSTITUTION OF APPELLANTS.

The fact that an action in a matter of common interest to many persons had been brought by one for the benefit of all would not give one for whose benefit the action had been brought the right to be substituted as plaintiff and appellant upon the failure of the original plaintiff to prosecute an appeal which he had effected.

SAME — APPEAL BOND BY SUBSTITUTED PARTIES.

Application to be substituted as appellants in a cause, and for leave to file a new appeal bond, is made too late, where more than ninety days has intervened after the notice of appeal from the judgment in the cause, and the time for filing bond under such appeal notice has expired.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Denial of motion for intervention.

James Kiefer, for petitioner.

McCafferty & Kane, for respondents.

The opinion of the court was delivered by

HADLEY, J.—An appeal was taken from the judgment below in this cause by both plaintiff and defendants. After the service and filing of the respective notices of appeal, and appeal bonds, the parties entered into a stipulation whereby it was mutually agreed that the respective appeals should be withdrawn and that neither appeal should be further prosecuted. The plaintiff, A. W. Hight, brought the

suit in his own behalf and in behalf of other citizens and taxpayers of the city of Ballard. Following the stipulation and withdrawal of the appeals aforesaid, Robert J. Huston and Hattie E. Huston, his wife, as taxpayers and property owners of the city of Ballard, moved this court for an order either substituting them as plaintiffs and appellants in the cause, or permitting them to intervene as plaintiffs and appellants, and to prosecute the said appeal heretofore taken by said A. W. Hight. The motion also asks that a time shall be fixed within which said Huston and wife shall file an appeal bond and briefs upon said appeal, and that the stipulation entered into between said plaintiff and defendants for the withdrawal and dismissal of their said appeals shall be set aside.

This motion is made upon the theory that the questions involved in the suit are public ones, common to all the taxpayers of the city of Ballard, and that the plaintiff, in bringing his action, was litigating and waging public questions, in which all the taxpayers of said city were similarly interested. It is therefore urged that the movers in this motion, as taxpayers in said city, are entitled to intervene or be substituted as parties plaintiff and appellant for the purpose of prosecuting said appeal inaugurated by the plaintiff in the action. It is conceded by counsel for the moving parties that the precise question presented here does not appear to have arisen in any of the reported cases. The right of intervention in this state is governed by statute, and under § 4846, Bal. Code, the application to intervene must be made "before the trial." The trial of this cause was long since concluded, and appeals were taken. We are not aware of any other statute upon the subject which authorizes an intervention in the cause after an appeal has been taken to this court. It follows that the mo-

July, 1903.] Opinion of the Court—HARLEY, J.

tion, in so far as it asks leave to intervene, must be denied.

It will be further observed that the motion is alternative, to the effect that, if an intervention is denied, then these moving parties ask to be substituted as parties plaintiff and appellant. We are referred to § 4834, Bal. Code, which provides as follows:

“When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.”

Counsel also cite *Clay v. Selah Valley Irrigation Co.*, 14 Wash. 543 (45 Pac. 141), as having construed the above section of the statute. In that case a portion of the holders of the bonds secured by a trust deed brought a suit to foreclose the trust deed. There were numerous other bondholders, residing at a distance, who were unknown to the plaintiffs. It was held that, the question being one of common and general interest to many persons, the plaintiffs could, under the above statute, maintain the action for the benefit of all. The correctness of that decision is not disputed here, but no question as to the right of substitution in such cases arose in that action. It has been held that in a proper case new parties may be substituted in the appellate court. 20 Enc. Pl. & Pr. 1068. We have examined the cases cited to support the above, and find that they were cases where a transfer of interest in the subject matter involved had occurred after the trial below, either by actual assignment or by operation of law. The substitution was therefore permitted in behalf of the real party in interest as successor of the original owner. There has, however, been no change of ownership or interest here. These moving parties have acquired no greater interest in the subject matter involved than they possessed at the time the action was commenced below, and no succession of interest has

taken place. The authorities above referred to as being cited to support a substitution in the appellate court "in a proper case," being wholly unlike this case, we are of the opinion that this is not a proper case for such substitution.

If this case could be classified as a proper one for the substitution of new appellants in this court, we are then confronted with another difficulty which arises upon this motion. We are asked to fix a time within which an appeal bond may be filed by the moving parties. In appeals from final judgments regularly entered the statute fixes the time as five days from the time the notice of appeal is given. § 6505, Bal. Code. If the notice is not given in open court at the time the judgment is rendered, it may be given within ninety days from the date of entry of final judgment. §§ 6502, 6503, Bal. Code. If these moving parties should be permitted to prosecute this appeal without giving a new notice, then the appeal would necessarily be based upon the original notice given by the plaintiff in the case. That notice was served March 10, 1903, and it is manifest that an appeal bond cannot now be filed under the statute to support the appeal taken by that notice, and the same was true at the time this motion was served. Again, if a new notice of appeal should now be given by the movers as substituted appellants, it would necessarily be after the expiration of ninety days from the entry of final judgment, which was also true when the motion was served. The decree was signed February 23, 1903, and filed on the 27th day of the same month. The motion was served June 9, 1903, which was after the full expiration of the time within which an appeal could be taken. We know of no statutory authority under which a new notice of appeal or a new appeal bond could be entertained by this court at this time. The appeal cannot be prosecuted by these ap-

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Syllabus.

plicants under the former bond given by the plaintiff, since it is conditioned only to pay costs and damages that may be awarded against the plaintiff himself on the appeal. This is conceded by the movers, inasmuch as they ask leave to file a new bond; but for the reasons stated we think such a bond would be ineffectual, and that they would have no appeal that could be prosecuted here, even if they should be formally substituted as appellants.

It is suggested that the withdrawal and dismissal of the plaintiff's appeal may have the effect to render the decree below *res judicata* as to the rights of these moving parties, and other taxpayers in the city of Ballard. Whether one who sues for the common benefit of many can consent to such a disposition of the case as will become *res judicata* of the rights of others so commonly interested, is not now before us for determination. Questions of negligence or fraud, and possibly of special authority to sue or want of such authority, might be involved in such determination, and they are not now properly here for examination.

The motion is denied.

ANDERS, MOUNT and DUNBAR, JJ., concur.

FULLERTON, C. J.—In all that is said concerning the right of intervention and substitution I concur. As to what is said concerning the appeal bond I express no opinion.

[No. 4594. Decided July 7, 1903.]

OLOF SWANSON *et al.*, Respondents, v. HELEN M. HOYLE,
Appellant.

SUMMONS — SERVICE BY PUBLICATION — SUFFICIENCY OF AFFIDAVIT.

An affidavit for publication of summons reciting that affiant is one of the attorneys of plaintiffs will be presumed in aid of

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judgment as stating the truth, where that fact is not negatived by the record, even if affiant's name was not signed to the complaint as an attorney in the cause.

SAME — AUTHORITY OF ASSISTANT PROSECUTING ATTORNEY IN TAX FORECLOSURE PROCEEDINGS.

An assistant prosecuting attorney is *ex officio* one of the attorneys for plaintiff, where an action for foreclosure of a delinquency tax certificate is brought by the prosecuting attorney under laws 1899, p. 296.

TAXATION — FORECLOSURE OF DELINQUENCY CERTIFICATES — SEVERAL JUDGMENT — SEPARATE LOTS JOINTLY ASSESSED.

Under Laws 1899, p. 300, which provides that, in cases of tax foreclosure, the "judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax or assessment included therein," a judgment of foreclosure against two lots jointly is a several judgment, where it appears that the two lots constitute but one indivisible tract by reason of their use as one tract in connection with a building erected upon both lots.

SAME — PLEADING.

In an action for the foreclosure of a tax delinquency certificate issued by the county treasurer, upon two lots, it is unnecessary to aver in the complaint that the two lots constitute one indivisible tract, as the presumption is the officer would not have issued the certificate in that form unless such were the fact.

VACATION OF JUDGMENT — ANSWER BY DEFENDANT — HARMLESS ERROR.

Permitting the defendant in a proceeding for the vacation of a judgment to file an answer to the petition, although Bal. Code, § 5157, provides that "the petition shall be deemed denied without answer," would not be prejudicial, where no other proof was offered by defendant than such as was admissible without an answer.

SAME — JUDGMENT INCLUDING ILLEGAL TAX.

The fact that judgment upon a tax foreclosure included taxes not lawfully assessed against the property is not ground for the vacation of the judgment, where the owner has been regularly summoned to appear and has had an opportunity to defend against the legality of any portion of the tax.

SAME — DISCRETION OF COURT — REVIEW ON APPEAL.

The refusal of the trial court to vacate a default judgment taken against a non-resident upon the ground that it was

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obtained against her by mistake, inadvertence, or excusable neglect does not show such an abuse of discretion as to warrant interference by the appellate court, where it appears that for a period of five years no taxes were paid on the property by the owner and no excuse was shown for their nonpayment, that one of her local agents was unaware that she owned the property, and others of her agents neglected to make payment, and no inquiry was made by her concerning such neglect.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Affirmed.

Frank D. Nash, for appellant.

Ellis & Fletcher and *Frank H. Graham*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Prior to the commencement of this action appellant was the owner of lots 1 and 2 in block 2 of Noble's addition to Tacoma. About May 31, 1901, respondents purchased a certificate of delinquency for taxes due against these lots for the year 1897, paying therefor the sum of \$24.43. They also paid taxes against the property for the years 1898, 1899, and 1900. In July, 1901, they brought an action in the superior court of Pierce county to foreclose such certificate. The summons in said action was served on appellant (who was then and is now a nonresident of the state) by publication. The action was brought by the prosecuting attorney of Pierce county. The affidavit for publication was made by his assistant, who stated in the affidavit that he was one of the attorneys for the plaintiffs. On September 23, 1901, a decree was entered by default for the sum of \$94.45, being the amount found due for taxes, interest, and costs. Thereafter, on October 5, 1901, the property was sold pursuant to said decree and a deed issued to respondents therefor. The lots

above described were assessed and taxed separately. The judgment entered was not a separate judgment against each lot, but a judgment against both lots for the amount of taxes due thereon. These two lots had been for many years inclosed by a fence owned by the same owner, and the building thereon actually stood on both lots, half thereof on each lot. Subsequent to the time of the sale the defendant learned that her property had been sold for taxes.

On June 26, 1902, she filed a petition to vacate the judgment, and to set aside the sale and deed issued under the foreclosure proceedings above stated. This petition set out substantially the following reasons why the decree and sale should be vacated: (1) That the summons in said action was not signed by the holders of the certificates of delinquency, but was signed by F. Campbell, their attorney. (2) That the affidavit upon which publication was based was made by C. O. Bates, who was not the attorney of record in the case. (3) That the judgment entered was not a several judgment against each lot for the taxes assessed against it; that neither in the complaint, summons, nor notice was the amount due for taxes, interest, and penalties on each lot described; that the judgment was for a lump sum against both lots; and that in the report of sale the amount due on each lot was not stated. (4) That said lots, prior to 1891, were outside the limits of the city of Tacoma; that a bonded indebtedness was incurred by the city of Tacoma prior to the time when said lots were included within the limits of said city; that during the year 1897 the city illegally levied a tax against said lots for the purpose of paying interest on said bonded indebtedness incurred before said lots were a part of said city; and that said illegal tax was included in and formed a part of the same for which judgment was entered. (5) That the defendant had no knowledge that suit had been brought to

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foreclose a lien for taxes against her property until about the month of May, 1902; that she supposed the taxes against her property had been paid by her agents in Tacoma; that, upon learning of such sale, defendant tendered to each of the purchasers the sum of \$115 for such taxes and costs, and offered to pay such additional sum as had been expended by plaintiffs on account of such property, which tender and offer were refused; that the said lots were of the value of about \$1,000.

After plaintiffs' demurrer to this petition had been denied by the court, an answer was filed, denying each of the matters set out above as reasons for vacating the judgment, and pleading affirmatively that the two lots were one tract, incapable of being subdivided by reason of the improvements thereon; that the taxes could not be segregated; that proofs thereof were made at the time of judgment; and that plaintiffs, since the purchase thereof, had expended about \$400 in improvements upon the property. A reply was filed by petitioner.

Upon a hearing of the petition, defendant offered to prove the allegation that the levy against the lots for the purpose of paying interest on the bonded indebtedness incurred before the lots were included in the city amounted to 97 cents, and was included in the judgment, which offer was rejected. The defendant then showed that she did not know that her taxes against these lots had not been paid, and that the agent in Tacoma, being away from the city, had neglected to pay the same for the years 1897, 1898, 1899, and 1900. Defendant then offered to show that the lots were assessed separately, which was denied. Plaintiffs then were permitted to show that there was a building on the two lots, partly on one and partly on the other, and that the property was an indivisible property. Judgment was

then entered dismissing the petition. Defendant appeals from this judgment.

Appellant bases her cause for reversal of the judgment upon four points, as follows: (1) The action was brought by F. Campbell, as attorney, the affidavit upon which publication of summons was made by C. O. Bates, and there is nothing in the record to in any way connect C. O. Bates with the case, except the statement in the affidavit made by him that he is one of the attorneys for the plaintiffs. (2) The judgment entered in the foreclosure action should have been a separate judgment against each lot for the taxes and penalties and interest against such lot. If the property was so situated, by reason of improvements covering both lots, that it was proper to assess and levy one tax against both lots, that fact should have appeared in the original summons and application for judgment, and proof should have been given of that fact before judgment was entered, and not when application was made to vacate the judgment. (3) Because there was included in the judgment the illegal tax for the year 1897 for taxes levied to pay the interest on the bonded debt of the city of Tacoma, incurred before the lots in question were a part of said city. (4) Because, under the showing made, the court should have opened and vacated the judgment under §§ 4953, 4880, and 5153 of Ballinger's Code. We shall consider these points in the order stated.

1. The sufficiency of the affidavit and the summons is not questioned, except in the fact that C. O. Bates, who made the affidavit, did not sign the complaint as one of plaintiffs' attorneys. The statute, at § 4877, Bal. Code, authorizes publication of summons "upon the filing of an affidavit of the plaintiff, his agent or attorney." The affidavit in this case shows that the affiant is one of the

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plaintiffs' attorneys. In the absence of any showing to the contrary, this was sufficient. The court was a court of general jurisdiction, and every fact not negatived by the record must be presumed to support the decree. *Belles v. Miller*, 10 Wash. 259 (38 Pac. 1050); *Kalb v. German Savings & Loan Society*, 25 Wash. 349, 357 (65 Pac. 559, 87 Am. St. Rep. 757). But further than this, it appears that the action was brought by the prosecuting attorney of Pierce county, as required by Laws 1899, p. 296, ch. 141, and that Mr. Bates was the assistant prosecuting attorney, which made him attorney for the plaintiffs.

2. It is true the law provides that, in cases of tax foreclosure, the "judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax or assessment included therein" (Laws 1899, p. 300, ch. 141), and that the treasurer shall sell to the person "offering to pay the amount due on each tract or lot for the least quantity thereof" (Laws 1899, p. 301, ch. 141). The reason for this rule is that the owner might want to redeem one lot or tract and not another (*Lockwood v. Roys*, 11 Wash. 697, 40 Pac. 346), and that, where a lot or tract is susceptible of division into smaller parcels than the whole, certain of these lots might be sufficient to pay the whole tax and leave the rest of the tract free to the owner. But where the lots or tracts are not capable of subdivision, by reason of improvements thereon, such as one building covering the whole of two or more lots, it was not intended that in such event the sale should be limited to a part of the tract or lot, where such part was incapable of being separated from the whole. It was only where the least quantity thereof was capable of subdivision that the legislature intended that a smaller part than the whole might be sold. This question arose in *Million v. Welts*, 29 Wash.

106 (69 Pac. 633), where an application was made to the treasurer of Skagit county to purchase a certificate of delinquency against two lots upon which a large brick building was located, which building also covered a third lot, and where the taxes were assessed separately against each lot, but where improvements thereon were assessed to the third lot. When the applicant made application to purchase a certificate of delinquency against the two lots, the treasurer demanded payment of all taxes assessed upon the property as a whole, disregarding the segregation into lots, and refused to issue a certificate for less than the whole tract. This court held that "the entire tax assessed on the three lots, land and improvements together, must be paid as levied upon the property as a whole."

If the treasurer could not be required to issue a certificate upon each tract or lot, because of the indivisibility thereof, it follows that, where a certificate is issued upon several tracts, it must be presumed, until the contrary appears, that such certificate is regular, and is issued upon an entire indivisible tract, because the officer is presumed to do his duty. It was, therefore, not necessary to allege in the complaint in foreclosure that the two lots were in fact one indivisible tract. Furthermore the statute provides:

"In all judicial proceedings of any kind for the collection of taxes, assessments and the penalties, interest and costs thereon, all amendments may be made which by law can be made in any personal action pending in such court, and no assessments of property or charge for any of said taxes shall be considered illegal on account of any irregularity in the tax lists or assessment rolls or on account of the assessment rolls or tax lists not having been made, completed or returned within the time required by law, or on account of the property having been charged or listed in the assessment or tax lists without name or any other name

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than that of the owner, and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collection of the taxes, shall vitiate or in any manner affect the tax or the assessment thereof, and any irregularities or informality in the assessment rolls or tax lists or in any of the proceedings connected with the assessment or levy of such taxes or any omission or defective act of any officer or officers connected with the assessment or levying of such taxes, may be, in the discretion of the court, corrected, supplied and made to conform to law by the court. The court shall give judgment for such taxes, assessments, penalties, interest and costs as shall appear to be due upon the several lots or tracts described in said notice of application for judgment or complaint, and such judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax or assessment included therein, including all penalties, interest and costs, and the court shall order and direct the clerk to make out and enter an order for the sale of such real property against which judgment is made, or vacate and set aside the certificate of delinquency or make such other order or judgment as in law and equity may be just." Laws 1899, p. 299, ch. 141, § 18.

Under this section it is clear that the legislature intended that the court should be liberal in enforcing the collection of the tax, and in pronouncing judgment as the justice of the case demands, and that a judgment should be a several judgment against each tract or lot, or part of a tract or lot. So that, if two or more lots or parcels be adjudged an indivisible tract, the judgment should be pronounced against the same as one lot or tract, even though the assessment were against each lot separately. Under no other theory can the case of *Million v. Welts*, *supra*, be justified. When the court in this case rendered judgment against the two lots as one tract, it must be presumed, in the absence of anything to the contrary, that the court found upon sufficient evidence that the two lots constituted

one tract. If the court erred in the judgment in this respect, that error cannot be corrected on this appeal. *Kuhn v. Mason*, 24 Wash. 94 (64 Pac. 182). It appears, however, and is not disputed, that the two lots constitute one indivisible tract. This fact is conceded. This being true, the allegation that the judgment was not a several judgment must necessarily fail.

Appellant argues that it was error of the court to permit respondents to file an answer to the petition. The statute (Bal. Code, § 5157) provides as follows:

“ . . . The facts stated in the petition shall be deemed denied without answer, and defendant shall introduce no new cause, and the cause of the petition shall alone be tried.”

This statute does not preclude the defendant from offering any evidence he may have to rebut the evidence of the facts alleged in the petition. Respondents were certainly authorized to offer any evidence admissible under a general denial. Their answer amounted to nothing more than a denial, and no proof was offered or received, which was not admissible without an answer. There was, therefore, no harm in filing the answer.

3. It is next insisted that the judgment should have been vacated because there was an illegal tax, amounting to 97 cents, for the year 1897, which was included in the judgment. A number of authorities are cited to the effect that a sale for taxes more than are lawfully chargeable is a sale without jurisdiction, and therefore void. This rule is possibly correct where the sale is made upon an assessment and levy by ministerial officers, and where there is no opportunity to test the legality of the tax until after sale. But where the sale is made upon a judgment by a court of general jurisdiction, and where the owner of the property

is regularly summoned to appear, and has an opportunity to defend against any irregularity of the tax levy or the amount of the tax, and neglects to do so, and where the court has jurisdiction to give judgment for the amount of the taxes which shall appear to be due, and which appears in law and equity to be just, as is the rule under the statute above quoted, a different rule applies. *Kizer v. Caulfield*, 17 Wash. 417, 425 (49 Pac. 1064). If the 97 cents was not properly chargeable against the property, the defendant could have defended against the judgment to that extent. Objections of this character are matters of defense to the original action. They are not matters which could be properly considered in the case at bar, because this is not an action to correct errors. It is one to vacate the whole judgment. If errors which could have been avoided by the appearance of the defendant have crept into the judgment by reason of his default, he cannot complain thereof, after judgment is entered, where the court has jurisdiction.

4. It is urged that the trial court should have vacated the judgment and relieved the appellant therefrom, on account of her mistake, inadvertence, surprise, or excusable neglect. The sections of the statute relied upon by appellant vest in the trial court a discretionary power to vacate the judgment upon these grounds. This discretion will not be interfered with by an appellate court, where there is no abuse thereof. *Titus v. Larsen*, 18 Wash. 145 (51 Pac. 351); *Sturgiss v. Dart*, 23 Wash. 244 (62 Pac. 858). It is true that courts should be liberal in granting leave to answer, and that relief must be granted in a plain case in order to subserve the ends of justice. *Hull v. Vining*, 17 Wash. 352 (49 Pac. 537). But we think no such inadvertence or excusable neglect is shown in this case as to

warrant us in finding an abuse of discretion on the part of the lower court. The evidence discloses that for a period of five years no taxes were paid by the owner on the property sold. One of her local agents did not know that appellant owned the property. Others without excuse neglected to pay the taxes, and no inquiry was made about the same. No excuse is shown why they were not paid. It is common knowledge that taxes are due each year. It is not surprising, therefore, that at the end of five years the owner should find that some steps had been taken to collect the taxes under the revenue act. Common prudence would dictate that inquiry at least should be made as to the condition of taxes due, and what steps were being taken to enforce collection; but none appears to have been made in this case until after judgment and sale, and until after the purchaser had taken possession and made valuable improvements thereon.

Finding no reversible error in the record, the judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4609. Decided July 8, 1903.]

ANDREW KROENERT, *Respondent*, v. PETER FALK, *Appellant*.

APPEAL — OBJECTIONS TO EVIDENCE — SUFFICIENCY FOR PURPOSES OF REVIEW.

Where objections to evidence in the trial court state no specific grounds against its admissibility, they will not be considered on appeal.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Affirmed.

July, 1903.]

Opinion Per Curiam.

Ira Bronson, for appellant.*Greene & Griffiths*, for respondent.

PER CURIAM.—Respondent brought this action, in the superior court of King county, against appellant, to recover upon a judgment rendered against appellant in the territorial court of Yukon Territory, Dominion of Canada. Upon the trial of the case in the lower court, respondent read in evidence three depositions, two of these made by the clerk of the territorial court of Yukon Territory and one by a deputy district registrar of the supreme court of British Columbia. In these depositions the deponents testified to the effect that the judgment was a judgment of record of the territorial court of Yukon Territory in the office under their charge, unsatisfied and in full force, and that a copy of the original judgment was attached as an exhibit to the deposition; that the judgment was in favor of the respondent and against the appellant. It was admitted in the pleadings that the territorial court of Yukon Territory was a court of general jurisdiction, and that no payments had been made on the judgment. No evidence was offered by appellant. Findings of fact and conclusions of law were made by the trial court in favor of respondent, and a judgment rendered for the amount prayed in the complaint. Appellant excepted to each of the findings of fact and conclusions of law upon the ground that the same were not supported by the evidence. These exceptions are all based upon the admissibility of the evidence of the foreign judgment.

The only questions presented in appellant's brief go to the admissibility of the evidence. He does not contend that the evidence is insufficient, if it is proper and competent. During the trial of the case in the superior court no objections to the depositions or to any of the interroga-

tories appear to have been made upon any specified ground. The following stipulation, however, appears at the conclusion of the evidence:

"It is stipulated by the parties hereto that the defendant objects to the interrogatories propounded by the plaintiff in said depositions and to the introduction of said exhibits, which objection and the exception the court overrules, and exception is allowed to the defendant by the court."

This kind of an objection is entirely too indefinite. If there was any ground upon which the interrogatories were objectionable, that ground should have been stated to the court, and some record made of it; or, if the exhibits were incompetent, or for any other reason inadmissible as evidence, that reason should have been called to the attention of the lower court. *Guarantee Loan & T. Co. v. Galliher*, 12 Wash. 507 (41 Pac. 887); *Bolster v. Stocks*, 13 Wash. 460 (43 Pac. 532, 534, 1099); *Price v. Scott*, 13 Wash. 574 (43 Pac. 634); *Coleman v. Montgomery*, 19 Wash. 610 (53 Pac. 1102).

In the absence of specific objections in the record, this court will not presume that the questions presented here were presented to the court below. The judgment is therefore affirmed.

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[No. 4629. Decided July 8, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. M. R. RIPLEY, *Appellant*.

APPEAL — SUFFICIENCY OF EVIDENCE.

Where there is evidence to support the verdict in a criminal prosecution, although it may not be of the most convincing kind, the verdict will not be disturbed on appeal on the ground of the insufficiency of the evidence.

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Syllabus.

SAME — HARMLESS ERROR — REFUSAL TO STRIKE TESTIMONY.

The denial of a motion to strike the answers of a witness to improper questions, to which no objection had been interposed, cannot be urged as error when the answers were not prejudicial to appellant.

SAME — IMPROPER EXAMINATION OF WITNESS.

The attempt to affect the credibility of a witness by asking him if he had ever been arrested for robbery was harmless error, where the witness answered that he was acquitted of the charge.

TRIAL — ADJOURNMENT TO PROCURE WITNESSES — DISCRETION OF COURT.

The granting or refusing an application by the accused for the adjournment of a trial to enable him to procure the attendance of absent witnesses is a matter within the discretion of the trial court, whose action will not be disturbed in the absence of a showing of abuse of such discretion.

EVIDENCE — ADMISSIBILITY OF HEARSAY FOR PURPOSES OF EXPLANATION.

Where a conversation by one of the state's witnesses to the effect that the accused would not get out of jail before he would be arrested again had been put in evidence, it was not error to permit such witness, in explaining his conversation, to show that he understood there were other warrants out for the arrest of accused, even though such testimony as to the warrants was mere hearsay.

SAME — EXAMINATION OF WITNESSES — REBUTTAL.

Where testimony had been introduced by the defense tending to convey the impression that a conspiracy existed among the state's witnesses to wrongfully convict the accused, it was not error to permit the state, in rebuttal, to introduce evidence in denial of such alleged plot.

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In such a case, evidence in rebuttal was also admissible for the purpose of showing the reputation as a peaceful, law-abiding citizen of a person who was not present at the trial, but who, a witness of the accused had testified, had threatened a witness who intended to appear in the interest of the accused.

ROBBERY — EVIDENCE — RES GESTAE.

Statements made immediately on recovering consciousness by one who had been knocked down and robbed, are admissible as

part of the *res gestae*, although made in the absence of the accused and by one who had been drinking just prior to the blow, since the weight to be attached to such statements owing to the mental condition of the witness at the time was for the jury to determine.

Appeal from Superior Court, Snohomish County.—Hon. JOHN C. DENNEY, Judge. Affirmed.

Silas M. Shipley, for appellant.

H. D. Cooley, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

HADLEY, J.—Appellant and one Graham were jointly charged with the crime of robbery, alleged to have been committed at Silverton, in Snohomish county. Separate trials were demanded, and at the trial of appellant the jury returned a verdict of guilty. A motion for new trial having been denied, the court sentenced the appellant to serve a term of ten years' imprisonment in the penitentiary, and entered judgment accordingly. This appeal is from said judgment.

It is assigned that the evidence is insufficient to establish robbery, and that the verdict should have been set aside. We do not deem it necessary to review the testimony here. We have read all the evidence, and find some conflict as to the amount of money the complaining witness may have had upon his person, and also as to other facts; but we are satisfied that there was ample evidence to sustain the verdict, if the jury believed it to be true. That they found it to be true is shown by the verdict itself, and since it was the province of the jury to pass upon the weight of the testimony, we shall not disturb the verdict on that ground alone. This court has heretofore announced that it will not disturb verdicts of this character, on the

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ground of alleged insufficiency of evidence, where there is evidence to support the verdict, although it may not be of the most convincing kind. Both the jury and the trial court have the opportunity to hear and see the several witnesses, to note their manner as to apparent candor and truthfulness, and are therefore better prepared to pass upon the credibility of their testimony than is this court with only a bare record of the words spoken by the witnesses. The weight of the evidence having been first passed upon by the jury, and next by the trial judge in denying the motion for new trial, we shall not undertake to say that they were wrong. *State v. Kroenert*, 13 Wash. 644 (43 Pac. 876); *State v. Murphy*, 15 Wash. 98 (45 Pac. 729).

It is assigned that the court erred in the following particulars: A witness for the defense was being cross-examined by the prosecuting attorney. He was asked if he did not know that the appellant had "rolled any number of people up there in Silverton," and further if he did not know that he "rolled one man up there, and when the officer went for him he gave the money back he took from him." Also if he did not know as a fact "that the better element in Silverton looked upon him as a crook." Appellant's counsel then demanded of the prosecuting attorney the name of the officer to whom he had referred. Thereupon counsel for the state replied: "If you want the name, I will get it and give it to you." Appellant's counsel then stated that he wished to have the officer subpoenaed, and asked the court to adjourn the trial until the officer could be brought before the court to testify. The request was denied. Appellant's counsel then moved to strike from the record all the evidence in regard to what the prosecuting attorney had stated concerning

“rolling somebody else or giving any money back to any officer.” The motion was denied. It is contended that the court erred in permitting the prosecuting attorney to cross-examine the witness in the manner above indicated, although no objections were interposed at the time the questions were asked, on the theory that it was the duty of the trial court to interfere of its own motion and protect the appellant against a violation of his constitutional right to a fair and impartial trial. We do not think any constitutional right was violated by permitting the questions, when no objections were offered. The appellant being represented by counsel, the court might have reasonably assumed that for some reason best known to appellant and his counsel they actually desired that the examination should proceed on the lines indicated, without interruption. We also think it was properly within the discretion of the court to deny the motion to adjourn the further hearing of the case. The court and jury were then regularly in the midst of the trial. If the conditions arising in the course of trials which seem to suggest the propriety of securing the attendance of witnesses not present should be held as legal ground for the adjournment of trials, the courts would be greatly embarrassed in the dispatch of public business. Conditions might arise in the course of a trial which would appeal to the trial judge as properly calling for an adjournment in the furtherance of justice; but the granting or refusal of such adjournment must rest largely in the discretion of the court, and we think there was no abuse of such discretion here. We also think no prejudicial error was committed in denying the motion to strike. The answers of the witness were not prejudicial to the appellant, and the questions of counsel were not evidence.

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Error is assigned upon the following: The witness Graham, who is also a co-defendant with appellant in this prosecution, was testifying in behalf of appellant when he was asked: "Is this the first time you were ever arrested for robbery?" Appellant objected to the question as incompetent and immaterial, and the objection was overruled. Counsel cites *State v. Payne*, 6 Wash. 563 (84 Pac. 317), in support of this claim. In that case the defendant upon trial was asked in cross-examination if he had ever been confined in the county jail, and if he had ever been convicted of a crime before, to all of which he answered "No." Afterwards the court permitted the prosecution to introduce the sheriff of the county, who testified, over objection, that the defendant had been in the county jail under a conviction of petit larceny before a justice of the peace. The sheriff also read from the jail record. It was held that this was error; that the state was concluded by the answer of the witness, and could not contradict him, since the subject matter of the inquiry was collateral to the issue before the jury. It was not held, however, that it is incompetent to attempt to prove a former conviction of a felony as affecting the credibility of a witness, but it was particularly pointed out that such proof may be made under § 1647, 2 Hill's Code (§ 5992, Bal. Code); and it was also shown that a distinction is to be observed between a former conviction of a felony and of a misdemeanor. The question in the case at bar related to a felony, and was not improper under the decision cited, insofar as it sought an admission from appellant of a former conviction of a felony. The question was probably objectionable in form in that it referred to a former arrest instead of a former conviction, but, inasmuch as appellant afterwards testified that

he was acquitted of the charge, we think it did not amount to reversible error.

Error is further urged upon the following: A witness on behalf of appellant had testified concerning an alleged conversation between himself and one of the state's witnesses, in which he claimed the latter had used the following language: "There is another job for them after they get through this. They will never get out of jail before they are arrested." The apparent purpose of this testimony was to show that some kind of conspiracy or organized effort existed to convict the appellant and his co-defendant, possibly without regard to the merits of the charges that might be made against them. Such an inference might at least have been drawn by the jury. In rebuttal the state placed its said witness upon the stand, and during his examination the following occurred:

"Q. Did you say anything about having another job framed up? A. I didn't say anything about a job. I said there were two more warrants. Q. What did you understand they were for? (Objection as immaterial and hearsay. The warrants are the best evidence. Overruled. Exception.) A. I understood there was a case in Index and another at Silverton—the Ross case. Q. You had heard of them, had you? A. Yes, sir. That's where I got the hearsay of these other charges."

The overruling of the above objection is assigned as error. It is urged that the witness was by hearsay referring to other matters disconnected with the case before the court. In view of the testimony that had been introduced by appellant as to what this witness had said and which might have left a wrong impression upon the jury as indicated above, it would seem that his testimony in rebuttal was no more than an explanation of his former

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conversation. We think this was not improper by way of correcting any erroneous inference the jury might have drawn without such explanation.

Further error is urged as to certain portions of the cross-examination of appellant, to which no objections were made at the trial. We shall therefore not now consider these matters as properly assigned.

In rebuttal the state introduced one Mr. Sutherland, who testified as follows:

"Q. Mr. Sutherland, do you know of any plot or conspiracy up at Silverton to railroad Mr. Ripley and Mr. Graham? (Objection as incompetent and immaterial, and as no part of the case. Overruled. Exception.) A. I do not. Q. Are you a party to any such plot or conspiracy? (Objection same as above. Overruled. Exception.) A. I am not. Q. Do you know Mr. McDermatt of Silverton? A. I do. He is a storekeeper; a general storekeeper of dry goods and groceries. Q. What is Mr. McDermatt's or McDonough's reputation in that community as a peaceable and law-abiding citizen? (Objection as immaterial and incompetent and irrelevant. Overruled. Exception.) A. It is good, as far as I know."

Error is urged upon the overruling of the above objections. As heretofore indicated, certain testimony introduced by the defense seemed to have been intended to convey to the minds of the jury the idea that a conspiracy existed among the state's witnesses to wrongfully convict the appellant. The witness Sutherland had already testified for the state, and it was to meet this line of appellant's testimony, that the witness was interrogated as above, in rebuttal, concerning his own knowledge of any such conspiracy. We do not think this was error. Referring to the last objection above noted under this assignment, we find that the testimony of the defense had

been to the effect that a Mr. McDermatt, a resident of Silverton, had by threats sought to intimidate one of the appellant's witnesses and prevent him from appearing as a witness at the trial. The aforesaid testimony might have had the effect to emphasize the idea in the minds of the jury that a sort of general conspiracy against the appellant existed at Silverton. Mr. McDermatt was not present at the trial, and had not been subpoenaed by the state as a witness. The state was therefore not in position to call upon him to deny what had been stated as having been said and done by him. The testimony concerning him had amounted to an attack upon his reputation as a law abiding citizen, and we believe under the circumstances that it was not improper for the state to show his reputation in that regard as bearing upon the improbability of the truthfulness of what had been said of him by appellant's witness.

Error is claimed upon the admission of certain statements made by the prosecuting witness soon after the alleged robbery occurred. These objections are based upon the ground that they were made in the absence of appellant; that they were not part of the *res gestae*; that they were incompetent because of the mental condition of the prosecuting witness; and that they did not show any connection of appellant with the robbery charged. The evidence showed that the prosecuting witness had been drinking, and there was further evidence to the effect that he had received a blow and was knocked down while out in the street; that he was afterwards dragged in an unconscious condition from that place to the edge of the sidewalk in front of a saloon. Within a few minutes after this, as he was aroused, the statements were made. We think they were a part of the *res gestae*, and were com-

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petent for that reason, although made in the absence of the appellant. The weight to be attached to them because of his mental condition was for the jury to determine in connection with other evidence bearing upon his condition. The same was also true as to their tending to connect appellant with the alleged crime.

We find no prejudicial error, and the judgment is affirmed.

MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4680. Decided July 8, 1903.]

SARAH M. LODGE, *Appellant*, v. JAMES HAMILTON LEWIS,
Respondent.

PROMISSORY NOTES — ACTION BY INDORSEE — SUFFICIENCY OF DELIVERY.

Prima facie ownership of a promissory note sufficient to uphold action thereon is established by evidence showing that it had been indorsed to plaintiff and action thereon brought in her own name, although she had never had the note in her actual possession and the attorney who brought suit thereon had been selected, not by herself, but by the agent of her indorser.

SAME — ASSIGNMENT — RIGHT OF ASSIGNEE TO SUE.

Under Bal. Code, § 4835, which provides that any assignee in writing of any chose in action may sue and maintain an action thereon in his own name, notwithstanding the assignor may have an interest in the thing assigned, but allows the debtor to plead any counterclaim or setoff against the real owner, an indorsee of a promissory note could maintain action thereon, even if title had not passed to the indorsee, and the question of the assignee's right to the note could not, under the circumstances, be raised by the maker.

Appeal from Superior Court, King County.—Hon.
WILLIAM R. BELL, Judge. Reversed.

Benton Embree, for appellant.

George Meade Emory and *E. F. Kienstra*, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This was an action upon a promissory note made by respondent and defendant to one Leander Lodge, and by Mr. Lodge transferred to his wife, who brought this suit in her own name. The complaint is in the usual form. The answer admits the making of the note, but denies that there is anything due thereon, and affirmatively pleads payment. In answer to the second paragraph of the complaint, to the effect that the payee before commencing the action, sold, transferred, and assigned the note to the plaintiff, defendant Lewis, in his answer, says: "This defendant has no knowledge or information sufficient to form a belief as to the allegations, or any of them, contained therein, and therefore puts the plaintiff to the proof of the same." Upon trial, after the conclusion of plaintiff's evidence, the defendant Lewis challenged the legal sufficiency of the evidence, and moved the court to dismiss the action upon the ground that the evidence shows that the appellant never had any ownership, possession, or right of possession to the note, for the reason that the note was never delivered to her, and that the payee, Leander Lodge, is the sole owner of the note. The court sustained this motion, and dismissed the action. Plaintiff appeals.

The sole question in the case is whether or not the court erred in dismissing the action upon this ground. The evidence shows that the note was executed by Frank Eberle and James Hamilton Lewis and delivered to Leander Lodge in June, 1892; that in 1893 Mr. Lodge

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moved from Seattle to California; that when he went away from Seattle he left this note, with other securities, with his agent, Mr. Dearborn; that in April, 1896, Mr. Lodge wrote a letter to Mr. Dearborn as follows:

"I think when you get to it you may deed all my property in Washington to my wife Sarah M. Lodge, and also assign all my notes to her. As I said, I owe nothing there, but I am working altogether too hard for my years, and, although now in good health, I presume that I am liable to go suddenly at any time, and this action on my part might save expense and trouble. I owe Mrs. Lodge about \$1,200, so there can be a reasonable and just consideration."

Thereupon Mr. Dearborn indorsed upon the back of the note in suit: "Pay to the order of Sarah M. Lodge. Leander Lodge, by W. W. Dearborn, his attorney in fact." Subsequently in August, 1896, Mr. Lodge wrote to Mr. Dearborn as follows:

"If you think best to give the notes you spoke of to an attorney or any of the others, do so, only have it stipulated: no collection, no pay. Hon. James Hamilton Lewis is surely ought to pay."

Thereupon Mr. Dearborn delivered the note to S. T. Williams, an attorney in Seattle, who brought this action in the name of Mrs. Lodge. The note did not pass out of the possession of Mr. Dearborn until it was delivered by him to Mr. Williams. Mrs. Lodge had not had actual possession of it, nor had she had any communication with Mr. Dearborn about it. The foregoing is the substance of plaintiff's evidence.

The indorsement on the note was *prima facie* evidence of the fact that the plaintiff was the payee. *Yakima National Bank v. Knipe*, 6 Wash. 348 (33 Pac. 834); *Brooks v. James*, 16 Wash. 335 (47 Pac. 751); *Seattle National Bank v. Emmons*, 16 Wash. 585 (48 Pac. 262).

It is probably true, as argued by respondent, that delivery of possession was necessary to complete the assignment. But where the plaintiff's attorney has possession of the note, and introduces the same in evidence, it must be presumed that he came lawfully by it, and that his possession is the possession of the plaintiff. When Mr. Dearborn, by request of Leander Lodge, delivered the note to Mr. Williams to bring suit upon it, such delivery will be held to be a delivery to the plaintiff, in the absence of direct evidence showing it was not so intended. It is true, Mr. Williams was selected by Mr. Dearborn as the attorney to bring the suit, but, if he had been selected by Mr. Lodge, and had brought the suit in the name of Mrs. Lodge, he would still be the plaintiff's attorney for the purpose of this action, and the delivery of the note to him by Mr. Lodge would be held to be a delivery to Mrs. Lodge, unless it clearly appears that such was not intended to be the result. It does not so appear in this case. The plaintiff was certainly authorized to maintain the action under § 4835, Bal. Code, which provides, in substance, that any assignee of any chose in action may, by virtue of such assignment in writing, sue and maintain an action thereon in his own name, notwithstanding the assignor may have an interest in the thing assigned; provided, that any debtor may plead in defense a counterclaim or offset, if held by him against the real owner. Under this section, if Mrs. Lodge had no real interest in the note, but was simply the assignee thereof, she might maintain the action. *McDaniel v. Pressler*, 3 Wash. 636 (29 Pac. 209); *Riddell v. Prichard*, 12 Wash. 601 (41 Pac. 905). On the question as to whether or not the plaintiff was the owner and holder of the note, this court said, in *Seattle National Bank v. Emmons*, *supra*:

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Syllabus.

" . . . it seems to us that this is a question which, outside of any right of off-set or counterclaim which the appellant may have, cannot be raised by the maker of the note. These are questions that are more interesting to the assignor and the assignee."

Especially is this true where no rights of the maker are molested, and where the result of the case is conclusive upon the parties to both the note and the action, as is the case before us. It was, therefore, error to sustain the motion.

The judgment is reversed, and the cause remanded for a new trial.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4687. Decided July 8, 1903.]

CORA B. STURGEON, *Appellant*, v. SIMON G. WIGHTMAN
et ux., *Respondents*.

ACCOUNT STATED — SUFFICIENCY OF EVIDENCE — NONSUIT.

In an action upon an account stated the grant of a nonsuit was improper where plaintiff's evidence tended to show an agreement for the payment of a stipulated sum at a specified date, and expressly denied the contention of defendants that the agreement was for the payment of the sum in monthly installments.

SAME — ACTION TO RECOVER MONEY PAID ON RESCINDED CONTRACT OF CONVEYANCE — TENDER OF RECONVEYANCE.

In an action upon an account stated to recover money paid upon a contract for a conveyance, where the contract had been rescinded by agreement of the parties, a reconveyance or tender of reconveyance is not necessary in order to entitle plaintiff to recover.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Reversed.

Byers & Byers, for appellant.

Root, Palmer & Brown, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an action upon an account stated. After the issues were made up and the cause came on for trial, plaintiff introduced her evidence and rested. Defendants moved for nonsuit, which the court granted, and thereupon dismissed the action. From this order plaintiff appeals.

The complaint is in the usual form, charging an account stated. It alleges that on or about December 10, 1901, an account was stated between plaintiff and defendants, in which was found due the plaintiff from defendants the sum of \$490, which defendants agreed to pay; that defendants subsequently paid \$287, and there was a balance due of \$203. Defendants, in their answer, denied the account, and set up affirmatively that on or about December 10, 1901, defendant S. G. Wightman entered into a contract with plaintiff, whereby plaintiff agreed to purchase a certain lot in Seattle for \$1,200, \$70 of which was paid down, and the balance was to be paid in monthly payments of \$20 each; that thereafter, in December, 1901, when plaintiff had paid the sum of \$490 on said contract, plaintiff and defendant S. G. Wightman entered into an oral agreement whereby said defendant agreed to refund to plaintiff the sum she had paid, less \$175, which was to be charged against plaintiff for the use of the property, the balance to be refunded in monthly payments of \$20 each; that it was then understood and agreed that the first named contract was thereby terminated and rescinded; that subsequently plaintiff recorded the first named contract in the office of

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the county auditor, and has not canceled or released the same of record; that said defendant has overpaid plaintiff \$23. Defendants prayed for judgment for the \$23 and for a cancellation of the contract. The plaintiff in reply denied the agreement to deduct the \$175, or any sum, for the use of the property, and denied that the payments were to be made by defendant in installments, but admitted a rescission of the former contract to purchase the lot, and disclaimed any right, title, or interest therein. The foregoing are substantially the issues in the case as set forth in the pleadings.

On the trial, plaintiff's agent, who transacted most of the business for her, testified directly and positively that on or about December 10, 1901, the parties entered into an agreement to rescind the former contract, and that the defendants agreed to repay the sum of \$490 to the plaintiff, which sum was to be paid on December 15, 1901. On that date the defendant S. G. Wightman paid \$10, and subsequently made other payments on the account. Plaintiff herself testified that on February 14, 1902, she called on Mr. Wightman, and they figured up what had been paid on the account, and found the amount to be \$237; that subsequently other sums were paid. Both witnesses denied that there was any agreement to deduct anything from the \$490 for rent, or that there was any agreement for monthly payments. This evidence is certainly *prima facie* evidence of an account stated, and was sufficient to take the case to the jury.

Respondents argue that the appellant is not entitled to recover, because she has not reconveyed or tendered a reconveyance of the lots to respondents. This is not an action to rescind the contract for the purchase of the lot. Both appellant and respondents in their pleadings agree

that that contract has been rescinded. It is, therefore, of no force; and appellant, in her reply, expressly disclaims any right, title, or interest in the lot. It nowhere appears that there was any conveyance of the lot to appellant. There was only a contract to convey, which contract is rescinded. The authorities cited, to the effect that, in order to obtain a rescission, the plaintiff must tender a reconveyance of property received, do not apply here.

The judgment is reversed, and the cause remanded for a new trial.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4698. Decided July 8, 1903.]

CHARLES S. HINCHMAN, *Appellant*, v. ISAAC W. ANDERSON *et al.*, *Respondents*.

LIMITATION OF ACTIONS — SUSPENSION BY STATUTORY PROHIBITION.

The fact that a mortgagee delayed the bringing of a personal action against the indorsers on the note secured by the mortgage until after the conclusion of the foreclosure proceeding would not operate as a suspension of the statute of limitations under Bal. Code, § 4812, which provides that "when the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action," by reason of the fact that the mortgagee is prohibited by Id., § 5893, from prosecuting any other action for the same debt while foreclosing his mortgage, inasmuch as the remedy was open to the mortgagee of including the personal action with the foreclosure proceeding.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Affirmed.

July, 1903.]

Argument of Counsel.

E. R. York, for appellant:

A statutory prohibition suspends the running of the statute of limitations. *Hoff v. Funkenstein*, 54 Cal. 233; *Blaskower v. Steel*, 23 Ore. 106; *Brehm v. Mayor, etc., of New York*, 104 N. Y. 186 (10 N. E. 158); *Moore v. Smith*, 7 S. E. 485; *Hall v. Brennan*, 64 Hun, 394 (19 N. Y. Supp. 623); *St. Paul, M. & M. Ry. Co. v. Oleson*, 91 N. W. 294; *Gordon v. Gilfoil*, 99 U. S. 168 (25 L. ed. 383).

A promise by the obligor that, if the obligee would delay proceedings to collect, he should have the same rights for the period delayed that he then had, is a waiver of the statute of limitations for the stipulated period. *Webber v. Williams College*, 23 Pick. 302.

George Ladd Munn, Reid & Meade, B. S. Grosscup and A. G. Avery, for respondents:

A statutory prohibition, to be effective, must be one which arises outside of a creditor's volition. He cannot by his affirmative action create such a condition as to bring himself apparently within its terms, and then say it was not himself, but the statute, which worked the prohibition. A debtor's right to have claims enforced before they become stale and his evidence of defense lost is not to be defeated by any such subterfuge. *Siegfried v. New York, etc., R. R. Co.*, 34 N. E. 331; *Kirby v. Lake Shore & M. S. Ry. Co.*, 120 U. S. 130 (30 L. ed. 569); *Merrill v. Town of Monticello*, 66 Fed. 165; *Walker v. Peay*, 22 Ark. 103; *Null v. White Water Valley Canal Co.*, 4 Ind. 431; *Bauserman v. Charlott*, 26 Pac. 1051; *Spokane County v. Prescott*, 19 Wash. 425; *Palmer v. Palmer*, 24 Am. Rep. 609.

The opinion of the court was delivered by

MOUNT, J.—Plaintiff brought this action in the lower court to recover upon five promissory notes. The defendants appeared separately and demurred to the amended complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action, and also upon the ground that the action was not commenced within the time limited by law. These demurrers were sustained. The plaintiff elected to stand upon his complaint, and the action was dismissed. From the order of dismissal, plaintiff appeals.

It will be necessary to consider only the last ground of demurrer. The facts stated in the complaint are substantially as follows: On November 27, 1891, the Point Defiance Railway Company executed and delivered to Henry Wood five negotiable promissory notes for \$10,000 each, due one year from date. Each of respondents, before delivery of the notes, joined in the execution of an indorsement on the back of each note as follows:

“We hereby severally join in the execution of the within note as original makers thereof and waive presentation and protest notice.”

The railway company, at the time of the making of the notes, and as security for the payment thereof, executed and delivered to the payee a mortgage upon its railway franchises, equipment, etc., in the city of Tacoma. Thereafter, and before maturity, the payee assigned and transferred the notes and mortgage to the appellant. The fourth paragraph of the amended complaint is as follows:

“That said promissory notes were not paid at the maturity thereof, nor any of them, nor any part of any of them, and in January, 1894, payment thereof being still in default, plaintiff placed said notes and mortgage in the hands of Charles S. Fogg, an attorney, residing at Ta-

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coma, Washington, with directions to bring suit upon said notes and mortgage. That defendants herein, and each of them, were then desirous and anxious, and it was a matter of interest, value and importance to said defendants that plaintiff should first exhaust his remedy against the mortgaged property, and, if possible, obtain satisfaction of his claim out of the mortgaged property without first enforcing the individual liability of the defendants upon said notes, and without making them parties defendant to the foreclosure suit which plaintiff was then preparing to commence. The plaintiff thereupon, and in compliance with the express desires and request of the defendants herein, and in consideration of their agreement and promises that by his proceeding in such manner these defendants would not claim that they were released or discharged from any liability to the plaintiff by so doing, caused his said attorney to prepare a bill of complaint for the foreclosure of said mortgage, making the mortgagor corporation a party defendant and omitting the defendants in this action; that said bill of complaint alleged the execution and delivery of said notes and mortgage, and their assignment to the plaintiff, that each and every of said notes was due and unpaid, and asked for the appointment of a receiver of the mortgaged property, the foreclosure of the mortgage and sale of the property, and payment of said notes, with interest and costs, from the proceeds of said sale; that said bill of complaint was exhibited to the mortgagor and the defendants herein, and an answer of the mortgagor to said bill was prepared and executed by the mortgagor, in which the execution and delivery of said notes and mortgage, their subsequent assignment to plaintiff, and that said notes were due and unpaid, was admitted, and consenting to the appointment of a receiver and the entry of a decree of foreclosure as prayed; also a decree of foreclosure was drawn ready for the judge's signature, and an order appointing a receiver of said property, and all of said papers were by consent of all parties placed in the hands of said Charles S. Fogg. That thereupon, on the 5th day of February, 1894, a stipulation, in writing was made, signed, sealed, and deliv-

ered, by and between this plaintiff and his said attorney, and said mortgagor and the defendants herein, whereby it was expressly stipulated and agreed that said Fogg might file said bill of complaint and answer, and procure the court to sign said order appointing a receiver and said decree foreclosing said mortgage at any time he might desire; and it was therein further stipulated that the plaintiff would not proceed against the defendants to enforce their liability upon said notes until on or after the 1st day of May, 1894, and that such extension should in no wise release any of the parties to said notes, and that the defendants thereby agreed that the institution of said foreclosure suit and the foreclosure of said mortgage in such manner should not be considered or construed as a waiver or release of the right to proceed against them; that all of the defendants herein signed said stipulation, except the defendant Mildred F. Wallace, and it was in said stipulation provided that the failure of any of the defendants herein to sign said stipulation should not affect the liability of those who did sign, but that those signing should be bound the same as though all had signed."

It is then averred that the appellant kept and performed all of the terms of said stipulation upon his part, and that the respondents have received, accepted, and enjoyed all of the benefits for which they stipulated; that appellant instituted said foreclosure suit against the mortgagor corporation, omitting the respondents herein, and diligently prosecuted the same in the superior and supreme courts, and did all in his power with diligence and in good faith to collect the full amount of his claim from the mortgaged property; that the superior court decreed appellant's mortgage was the first lien on the mortgaged property, and said mortgaged property was sold under decree of foreclosure, and the proceeds paid into court, and, by the terms of said decree of the superior court, appellant was entitled to and did receive the full amount of

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his claim, principal, interest, costs, and attorney's fees; that one John C. Lewis, trustee, the holder of a second mortgage upon said property, and a defendant in said foreclosure suit, appealed from the decree of foreclosure to this court, and this court modified the decree of the superior court in respect to certain of the rolling stock, and held that the Lewis mortgage was a first lien thereon, and remanded the cause to the superior court for further proceedings.

"Thereafter, it appearing in said foreclosure suit in this (superior) court that the plaintiff would be compelled to refund a portion of the sum which he had received in satisfaction of his claim from the proceeds of sale of the mortgaged property, plaintiff, by leave of court, filed in said foreclosure suit and caused to be served upon the defendants herein an amended complaint making the defendants herein parties defendant, and praying that these defendants be brought into said cause and a judgment rendered against them and in favor of the plaintiff for whatever sum this plaintiff should be adjudged to pay to said John C. Lewis, trustee; and shortly thereafter plaintiff, by leave of court, filed a second supplemental and amended complaint in said suit. The defendants herein were duly summoned to appear and answer to said amended complaint, and in due time appeared therein, and on or about January 17, 1900, the defendants herein served and filed their demurrers to said second amended and supplemental complaint, upon the ground that the same did not state facts sufficient to constitute a cause of action against them, and other grounds; and upon the argument of said demurrers the court, on April 21, 1900, sustained said demurrers upon the ground that at that time plaintiff had not yet been ordered or decreed to refund or pay over to said Lewis any part of the money received by plaintiff in satisfaction of his claim out of the proceeds of the sale of the mortgaged property, but that, on the contrary, plaintiff still retained the full amount thereof in his possession, and that the proceeding

in said suit against the defendants herein was then premature; and thereupon on April 21, 1900, defendants herein were dismissed from that suit."

It is then alleged that thereafter, on December 18, 1900, the superior court entered its decree in said foreclosure suit, adjudging that plaintiff must refund and pay to said Lewis, trustee, of the funds received by plaintiff from the proceeds of the sale of the mortgaged property in satisfaction of his claim, the sum of \$5,000, and at the same time decreed that the entry of satisfaction of plaintiff's judgment in said foreclosure suit be modified and corrected so as to show a deficiency of said sum of \$5,000, with interest from January 18, 1895, at the rate of eight per cent per annum; that prior to the commencement of this action plaintiff paid said sum to said Lewis, and secured the modification of the entry in the execution docket so as to show a deficiency as above specified. It is then alleged that said foreclosure suit was pending, and was diligently and in good faith prosecuted by appellant, and was not finally determined until December 18, 1900, when the final decree of the superior court was made and entered therein; that the Point Defiance Railway Company lost all its property and franchises in the foreclosure suit, and has been ever since insolvent, and without means or property of any kind, and ceased to do business; that no action or proceeding at law is now being prosecuted, or has ever been brought or had, for the recovery of the indebtedness evidenced by said promissory notes or any part thereof, and appellant is not now seeking to obtain satisfaction or execution upon said decree of foreclosure; that there is now due and owing to plaintiff from the defendants the sum of \$5,000, with interest at eight per cent. per annum from the 18th day of January, 1895, and an attorney's fee of five per cent. upon the amount

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which may be found due. It will be observed that the notes sued on were made on November 27, 1891, and matured one year thereafter. In 1894 an action was begun against one of the makers, viz., the railway company, to foreclose the mortgage. These defendants were not parties thereto. But these defendants, before the action was begun, entered into a stipulation to the effect that the appellant would not proceed to enforce liability against the defendants herein until after May 1, 1894, and that such extension should not have the effect to release any of the makers of said notes. Subsequently, during the pendency of that suit, the appellant attempted to make these defendants parties thereto, but was unsuccessful. Thereafter, in December, 1900, that suit was terminated, and the appellant was required to refund \$5,000 on account of the property sold under the original decree therein, and this action is to recover that amount as a deficiency upon the notes.

Since this action was not begun until the year 1901, it is perfectly clear that more than six years have run against the notes, both from the maturity thereof in November, 1892, and from the date fixed by the stipulation, viz., May 1, 1894. In order to avoid the statute of limitations, appellant contends that the statute was suspended by the commencement of the mortgage foreclosure suit in April, 1894, by virtue of §§ 5893 and 4812 Bal. Code. These sections are as follows:

“5893. The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter while he is foreclosing his mortgage or prosecuting a judgment of foreclosure.”

“4812. When the commencement of an action is stayed

by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action."

This last section clearly provides that where the commencement of an action is stayed by injunction or statutory prohibition, then the statute of limitations ceases to run. It applies to cases where, for some reason beneficial to the debtor, the commencement of the action is prohibited; such as administrators, as in the case of *Brigham-Hopkins Co. v. Gross*, 30 Wash 277 (70 Pac. 480). It does not apply to cases where the creditor may voluntarily select one remedy which alone can be prosecuted. The commencement of an action cannot be said to be prohibited when the plaintiff is at liberty to pursue the action in one of two or more different forms. Section 5893 was enacted to prevent a multiplicity of suits for the same debt at the same time. It prohibits the foreclosure of a mortgage while the plaintiff is pursuing another action for the same debt. It also prohibits any other action for the same debt while the plaintiff is foreclosing a mortgage. In other words, two separate actions cannot be maintained at the same time for the collection of the same debt. But this section does not prohibit the commencement of an action. The plaintiff may select his remedy. He may bring an action at law upon the notes, or he may bring an action in equity to foreclose his mortgage. He cannot maintain both actions independently at the same time. This section did not prevent the plaintiff from making all the parties to the notes parties to the action and proceeding against all in one action. It simply prohibited the plaintiff from splitting up his cause of action and maintaining two separate actions for the same debt at the same time. He had his election of remedies. In

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either remedy he was at liberty to join all the makers of the note in one action, or, since the notes were joint and several notes, he was at liberty to proceed against any one of the makers without joining the others. He was not prohibited from bringing his action. He was at liberty to pursue either of the remedies. He voluntarily pursued his remedy to foreclose the mortgage against one of the makers. Where a party has a choice of remedies and makes his election, the statute does not cease to run as to other remedies. *Garrett v. Bicklin*, 78 Iowa, 115 (42 N. W. 621); *Hanna v. Kasson*, 26 Wash. 568 (67 Pac. 271). In *Hanna v. Kasson*, *supra*, where an action was brought and judgment entered upon notes secured by a mortgage, and subsequently an action was brought to foreclose the mortgage, we held that the entry of the judgment could not have the effect to extend the statute of limitations as to a right of action upon the mortgage. If an action upon the notes does not suspend the statute as to the remedy upon the mortgage, an action to foreclose the mortgage certainly does not suspend the statute as to a remedy upon the notes. The rule must apply the same in both cases. These sections above quoted do not have the effect contended for by appellant. The action is clearly barred.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4445. Decided July 9, 1903.]

UNION BANK, *Respondent*, v. PETER B. NELSON, *Appellant*.

JUDGMENTS — RES JUDICATA — MISTAKEN MOTION FOR NONSUIT — EFFECT.

A judgment of nonsuit on motion therefor, which was granted on the ground that the plaintiff failed to prove its corporate capacity, the findings of fact and conclusions of law showing that the merits of the controversy were not considered, but they and the judgment all reciting the making and sustaining of the motion for nonsuit, would not be *res judicata* as to a second action, although defendant might have been entitled to a judgment on the merits, in case of the proper motion therefor.

Appeal from Superior Court Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Adolph Munter, for appellant.

E. H. Belden, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action upon a promissory note. To the complaint, which is in the usual form, the appellant answered, pleading, among other defenses, a former judgment rendered in an action had between the parties upon the same cause of action. Issue was taken upon the answer and the cause tried before the court without the intervention of a jury, resulting in a finding and judgment for the respondent.

The only question brought here is the sufficiency of the proofs to sustain the plea of *res judicata*. These proofs consist of the record in the former action. It appears therefrom that after the plaintiff had introduced its evidence and rested, the defendant moved for a judgment of nonsuit against the plaintiff, which the court granted

July, 1903.] Opinion of the Court—FULLERTON, C. J.

on the ground that the plaintiff had failed to prove its corporate capacity, making a finding of fact to that effect, on which it entered judgment. The appellant claims now that his motion in the former action was, in effect, a motion for a judgment on the evidence, and that the court ought to give it that effect, and that the judgment is in fact a judgment on the merits, and not a judgment of nonsuit. Noticing the latter part of the claim first, plainly the appellant is mistaken as to the effect of the judgment. While it is not in form that prescribed by the Code for a judgment of nonsuit, the record does not leave it in doubt that it was so intended. The appellant moved for a nonsuit, and it was this motion, so the record recites, that the court granted. The findings of fact and conclusions of law both show that the merits of the controversy between the parties were not considered, and these and the judgment all recite the making and sustaining of the motion for nonsuit. As to the other part of the claim, the court will not, under these conditions, give the judgment any greater effect than it was intended to have. The judgment was sufficiently harsh as it was. The cause was being tried before the court without a jury, and it would seem that it would not have been anything more than the exercise of a sound discretion for the court to have granted the plaintiff's motion for a new trial, and not subjected it to the costs of another action for a mistake of so technical a character. As the judgment relied upon was a judgment of nonsuit and not a judgment upon the merits, it is not a bar to this action.

The judgment appealed from will therefore be affirmed.

HADLEY, MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4657. Decided July 9, 1903.]

HENRY WAX, *as Trustee, Respondent*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Appellants*.

APPEAL — NOTICE — FAILURE TO SERVE CODEFENDANT.

Failure of appellant to serve notice of appeal on a codefendant who does not join in the appeal is ground for its dismissal.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Appeal dismissed.

H. E. Foster, for appellant.

Struve, Allen, Hughes & McMicken, for respondent.

PER CURIAM.—The respondent, who was plaintiff below, brought this action against the Northern Pacific Railway Company and C. C. Cooper, as defendants, to recover certain personal property alleged to belong to the estate of one Harry Winters, of which the respondent was trustee in bankruptcy, which personal property, it was alleged, the defendants wrongfully and unlawfully withheld from the possession of the respondent. The defendants appeared separately and by separate counsel and separately answered to the merits of the controversy. A trial was thereafter had, resulting in a judgment for the respondent. The defendant C. C. Cooper appealed from the judgment, but did not serve her notice of appeal on her co-defendant, and the respondent moves to dismiss the appeal for that reason. The motion must be granted. Under the statute and the repeated rulings of this court, such an omission is fatal to the right to have the case heard on appeal. Appeal dismissed.

 July, 1903.] Opinion of the Court—MOUNT, J.

[No. 4633. Decided July 10, 1903.]

JERRY S. ROGERS, *Respondent*, v. JOHN TRUMBULL, *Appellant*.

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| 32 | 104 |

APPEAL IN TAX CASES — TIME FOR TAKING — CHANGE IN PERIOD — RETROACTIVE EFFECT.

The passage of an amendatory act changing the limitation on the right of appeal in tax foreclosure cases from six months to thirty days would not, in the absence of express provisions to the contrary, apply to judgments rendered prior to the taking effect of the new act, further than to limit the right of appeal to not more than thirty days after the taking effect of the new act in such cases as still had a right of appeal under the old law.

SAME — SERVICE OF BOND WITH NOTICE OF APPEAL.

Failure to serve an appeal bond on respondent at the same time the notice of appeal is served is ground for the dismissal of the appeal, under Laws 1903, p. 74, § 4, regulating the procedure in tax foreclosure cases.

Appeal from Superior Court, Jefferson County.—Hon. GEORGE C. HATCH, Judge. Appeal dismissed.

Trumbull & Trumbull and *A. H. Sawyer*, for appellant.

A. W. Buddress, for respondent.

The opinion of the court was delivered by

MOUNT, J.—On September 8, 1902, the superior court for Jefferson county rendered a judgment against appellant and in favor of respondent foreclosing two certificates for delinquent taxes upon real estate. On March 9, 1903, the appellant served upon respondent's attorney a notice of appeal, and on the same day filed an appeal bond, which had theretofore, on the 7th day of March, been approved by the trial court. This bond was not served. Respond-

ent moves to dismiss this appeal upon two grounds: (1) That the appeal was not taken within the time allowed by law; and (2) that the appeal bond was not served upon respondent as required by law.

1. Under the statute in force at the time the judgment was rendered (Bal. Code, § 1757), the appellant had six months after the rendition of the judgment within which to take his appeal. He had, therefore, all of the 8th day of March, 1903. This day was Sunday, and therefore under the statute was excluded (Bal. Code, § 4896), and appellant therefore had all of the next day, March 9, in which to give his notice of appeal. *Spokane Falls v. Brown*, 3 Wash. 84 (27 Pac. 1077); *Bank of Shelton v. Willey*, 7 Wash. 535 (35 Pac. 411). On March 9, the act of 1903 took effect, amending the act under which this appeal is prosecuted. The amended act limits the time within which an appeal may be taken to thirty days after the rendition of the judgment. Laws 1903, p. 74. This appeal was taken after the amendatory act took effect. It is contended by counsel, on behalf of the motion, that the amendatory act is retrospective, and, since more than thirty days had elapsed after the judgment was rendered, appellant's notice of appeal was too late. The amendatory act of 1903 does not purport to be retroactive in its terms. It simply provides:

"Appeals from the judgment of the court may be taken to the supreme court at any time within thirty days after the rendition of said judgment."

Retroactive statutes are generally regarded with disfavor. Those not remedial will not be construed to operate retrospectively unless the intent that they shall do so is plainly expressed. Sutherland, *Statutory Construction*, § 463. The same author, at § 482, says:

"Where statutory relief is prescribed for a cause which is continuous in its nature, . . . the future continuance of the cause may be supplemented by the time it was continuous immediately before the act was passed to constitute the statutory period. No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to future proceedings from the point reached when the new law intervened. A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist. Every case must to considerable extent depend on its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness and justice."

To the same effect is § 281 of Endlich on Interpretation of Statutes. There is no indication in the act of 1903 that it applied to judgments rendered prior to the time the act took effect, so that judgments rendered more than thirty days prior thereto were barred of the right of appeal. It, therefore, under the rule above announced, applied only to judgments rendered subsequently, or to those where the right of appeal under the old law extended more than thirty days from the time the act took effect. The judgment under consideration is not within either class mentioned, because the time for appeal ex-

pired under the old law, within thirty days after the new law took effect. The notice of appeal was therefore in time.

2. From the rule as stated above—that, where a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings—it follows that the second ground of the motion must be sustained, because the bond was not served at the time of the service of the notice of appeal, or at all. The statute provides that, when written notice of appeal is served and filed, the appellant shall serve and file an appeal bond, “which bond shall be so served and filed at the time of the service of the notice of appeal.” This provision, in effect, makes the bond an essential part of the notice of appeal. In *Savage v. Graham*, 14 Wash. 323 (44 Pac. 540), we held that the filing of a bond was necessary to give this court jurisdiction, and that failure to file the bond within the time required by law was fatal to the appeal. See, also, *Kasch v. Nelson*, 20 Wash. 315 (55 Pac. 118). Counsel for appellant cite *DeRoberts v. Stiles*, 24 Wash. 611 (64 Pac. 795), to the effect that it was not necessary to serve the bond. That case was under a statute which did not require the service of the bond, while the statute under consideration in express terms requires the bond to be served at the time of the service of the notice of appeal, when the notice is in writing. This requirement is reasonable, and should be complied with.

For this reason, the motion is sustained and the cause dismissed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

July, 1903.]

Argument of Counsel.

[No. 4563. Decided July 11, 1903.]

GEORGE KINNEAR, *Appellant*, v. SARAH MOSES, *Respondent*.

PARTY WALL AGREEMENT — COVENANT RUNNING WITH LAND — ENFORCEMENT AFTER CONVEYANCE BY COVENANTEE.

Where the owners of adjoining lots, on which a party wall had been constructed, under an agreement making the promise to pay one-half the expense thereof a covenant running with the land, united in a conveyance of one of the lots by warranty deed without any reservation whatever, the grantee acquired the lot and the portion of the wall thereon freed from any liability under the covenant for repayment of one-half its cost.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

James M. Epler and *Charles A. Kinnear*, for appellant:

Party wall agreements run with the land and are as binding on the assigns of the original parties as they were on the parties to such agreements. Any party purchasing after such agreement is bound by its terms, when notice thereof is given. *Richardson v. Tobey*, 121 Mass. 457; *Savage v. Mason*, 3 Cush. 500; *Weld v. Nichols*, 17 Pick. 538; *Bronson v. Coffin*, 108 Mass. 175; *Platt v. Eggleston*, 20 Ohio St. 414; *Thompson v. Curtis*, 28 Iowa, 229; *Brown v. Pentz*, 1 Abb. App. Dec. 227; *Rindge v. Baker*, 57 N. Y. 209; *Ensign v. Sharp*, 72 Ga. 708; *McCourt v. McCabe*, 46 Wis. 596. The doctrine of party wall agreements, and the liabilities and responsibilities incident to them, is not that of incumbrances upon the land, but is simply the obligation of mutual easements upon or over the lands subject to such agreement. *Ake v. Mason*, 101

Pa. St. 17; *Smith v. Hughes*, 50 Wis. 620; 2 Devlin, Deeds, p. 213.

Will E. Humphrey, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Plaintiff brought this action against defendant, Sarah Moses, to recover one-half the cost of a party wall, under a party wall agreement. When the plaintiff had introduced all his evidence, the court dismissed the action because the evidence was not sufficient to make a cause of action against the defendant. Plaintiff appeals.

The undisputed facts are as follows: In 1889 appellant was the owner of lot 2 in block 14, Maynard's Plat of the City of Seattle. At the same time appellant and his wife and W. R. Brawley and wife were the owners of the north half of lot 3 in the same block. Lot 2 adjoined lot 3 on the north. In December of 1889 the owners of these two parcels of land entered into a party wall agreement, to the effect that the owners of either parcel might build a party wall on the line between the lots, and that when the owners of either parcel should use said wall, or any part thereof, those so using said wall should pay the parties who constructed the wall, or the owner thereof, one-half the cost of construction of the portion of the wall and the foundation actually used. The parties then agreed that these agreements should be covenants running with the land. The agreement was acknowledged and recorded in the public records. Thereupon the appellant, in the year 1889, built a party wall upon the line between the two parcels of land, at a cost of \$4,874.08. Thereafter, in July, 1900, appellant and wife and James Dickson and wife, who were the owners

July, 1903.] Opinion of the Court—MOUNT, J.

of both parcels at that time, sold and conveyed the north half of lot 3, above named, with the appurtenances, to the respondent, by warranty deed, without any reservation whatever. The respondent thereafter built a building on her lot, and used the wall as a part thereof. After the building was completed, appellant demanded of respondent \$2,437.04, being one-half the cost of the party wall.

It seems clear to us that the appellant has no cause of action. Even if the party wall agreement is a covenant running with the land, it applied only to those who, by virtue of the agreement, had no interest in the wall which stood upon their land. If respondent had purchased from some person who owned the land, but who did not own the wall, of which fact she was probably bound to take notice, she would have acquired no right to the wall, except that given by the party wall agreement. But when she purchased of the appellant, who owned both the wall and the land, she purchased all his right, title, and interest, as expressed in the deed. If the appellant had been the sole owner of both parcels of land and the wall standing thereon, and had sold all the land and appurtenances, without any reservation, he certainly could not afterwards claim an interest in the wall because at some prior time he had a party wall agreement with the former owner. When he sold the land without reservation, he sold all that was appurtenant thereto, including whatever part of the wall was upon the land sold.

The judgment is therefore affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS and HADLEY, JJ., concur.

[No. 4586. Decided July 14, 1903.]

NORTHWESTERN WAREHOUSE COMPANY *et al.*, *Respondents*, v. OREGON RAILWAY AND NAVIGATION COMPANY, *Appellant*.

CONSTITUTIONAL LAW — PREVENTION OF MONOPOLIES AND PREFERENCES
— SELF-EXECUTING PROVISIONS.

Art. 12, § 15, of the state constitution forbidding discrimination in charges or facilities for transportation to be made by any railroad company, and Id., § 22, prohibiting contracts between companies limiting the production or regulating the transportation of any product or commodity, are not self-executing, but are limited in their operation to such interpretations as have been given them by legislative enactment.

MANDAMUS — OMISSION OF LEGAL DUTY.

The writ of mandamus will not issue in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty then due at the hands of the party against whom relief is sought.

SAME — DENIAL OF TRACK CONNECTIONS BY CARRIER.

Under Bal. Code, § 4322, which provides that it shall be unlawful for any railroad to discriminate in charges or facilities for transportation, that every company permitting any one to connect a track with its track for the accommodation of any warehouse or elevator, etc., shall accord the same right to every other person soliciting it, which may be enforced by mandamus at the suit of any person entitled to such right, the owner of a warehouse or elevator cannot compel a railroad company to extend a spur of its track away from its existing tracks and over land not belonging to the railroad, when it has never done a like service to other shippers in the same line of business, but has confined its service to according them facilities for shipment by granting to them leases upon its right of way for the construction of elevators abutting upon its tracks.

SAME.

In a proceeding to enforce by mandamus a demand upon a railroad company for an extension of its track to plaintiff's warehouse, an alternative offer to accept from defendant a lease

of a portion of its right of way, in accordance with its policy in dealing with other like shippers, cannot be enforced as a demand for a lease, when the offer to accept a lease was too indefinite in its terms to be made the basis for a writ of mandate.

MONOPOLIES — RESTRICTION OF TRANSPORTATION FACILITIES.

A monopoly in the warehouse business in a locality is not shown by the fact that the business was restricted to locations upon the lands of a railway company, when it further appears that for years various persons owned and operated warehouses thereon, among them one of the plaintiffs, and that the right was open to the plaintiffs to engage in the business upon the same terms and with like facilities as were enjoyed by existing warehouses.

Appeal from Superior Court, Garfield County.—Hon. CHESTER F. MILLER, Judge. Reversed.

Cotton, Teal & Minor, L. S. Wilson, H. F. Conner and Cosgrove & Russell, for appellant.

John J. Balleray and Gose & Kuykendall, for respondents.

The opinion of the court was delivered by

HADLEY, J.—The respondents applied to the superior court of Garfield county for a writ of mandate directed to the appellant corporation, commanding it to give respondents track connection with its railway line at the city of Pomeroy, Washington, in such a manner as to furnish respondents the same shipping facilities claimed to be now furnished to other warehousemen and shippers at said city. The affidavit in support of the application shows that the respondent Northwestern Warehouse Company is a corporation organized under the laws of California, and has complied with the laws of Washington authorizing it to transact business in this state. The affidavit was sworn to by the respondent Cluster, who states that he is now constructing a large warehouse for the purpose

of receiving, storing, and shipping grain for the public for hire; said warehouse being located easterly of the terminus of the railway line of appellant at Pomeroy, upon lands which are particularly described, and alleged to be lying north of and contiguous to said railway line extending easterly from said terminus a distance of about 250 feet. It is also alleged that said warehouse has no track connection with said railway line, and no means of loading freight upon the cars of appellant, except by hauling the same thereto by wagon or other less convenient method; that the appellant is operating a railway line from the city of Portland, Oregon, to Pomeroy, Washington, and owns and operates the only railway at Pomeroy, and that there is no other railway in the county of Garfield, in which the city of Pomeroy is located; that about 2,000,000 bushels of grain for export are annually produced in said county, and about 1,500,000 bushels are annually delivered at the various warehouses in Pomeroy for shipment, the same being annually shipped for hire by the appellant to Portland; that there is no other way of shipping said grain than over appellant's railway; that the present system of warehouses at Pomeroy will not hold to exceed one-half of the grain that will be delivered at said point for shipment during the present season (meaning the season of 1902); that the farmers of said county are now commencing to harvest a very large crop of grain, and not less than 1,500,000 bushels tributary to Pomeroy will be harvested within the next ninety days, and delivered at Pomeroy on the appellant's line of road for storage and shipment; that the delivery of grain at Pomeroy will commence about July 20th of the present year, and such delivery will be constant and rapid thereafter until the present crop is delivered; that the respondent Northwestern Warehouse Company owns the land upon which said

warehouse is being built, and has agreed to lease the same to the affiant, its co-respondent herein; that said warehouse will be ready for storing and shipping grain by August 1st of the present year. It is further averred that on June 24, 1902, the respondents notified appellant that they had ordered the material for the purpose of building a grain warehouse at Pomeroy, and that they were ready to commence the construction thereof; that they further informed appellant that they had secured the ground, and that the proposed warehouse would be located upon the lands mentioned, extending along and easterly of the present terminus of appellant's said line; that on said day the affiant, for himself and his co-respondent, demanded of the appellant an easterly extension of its present line of road a distance of about 250 feet, and offered to do the grade work at any time at the expense of respondents, and under the direction of appellant. It is further stated that they informed appellant that they desired the work done at once, as they intended to have the warehouse completed for receiving, storing, and shipping the grain crop then growing in said county, and that they would be ready to receive and ship the same by July 20th of said year; that they further notified appellant that they had secured the right of way for the extension of the track to their said warehouse, and that they consented to an extension of the line of road over such property; that they also demanded that appellant should make proper track connection with said warehouse, and have the same completed so that they could ship grain over said railway line commencing not later than July 20, 1902. It is further averred that at the time of making the demand above outlined respondents made the following offer in addition thereto, to wit: That in lieu of the above demand they were willing to accept warehouse grounds having a length of 200 feet along said rail-

way line at any point on appellant's lands within given limits (which are designated in the affidavit), such grounds to be on the northerly side of said railway track. A further condition of such offer was to the effect that, if said lease should be made, it should embody such terms as would afford respondents reasonable shipping facilities, and that the territory included in the lease should extend northerly the full width of appellant's lands at that point. The refusal of appellant to comply with said demand or to accept said offer is alleged, and further allegations are made to the effect that for years past the appellant has leased its lands at and near the terminus of its said railway line contiguous to such line and its switches for warehouse purposes at a nominal cost to persons named and others unknown to respondents; that appellant has made for such persons, at their request and at appellant's expense, all switches and spurs necessary for track connection with its main line, so that they have ample facilities for shipping grain into and out of their said warehouses, and has during such years shipped to and from such warehouses, over its railway line, all the grain delivered at Pomeroy for shipment, aggregating many millions of bushels. Similar allegations are made relating to other persons and places along appellant's line of railway. It is further averred that in the manner aforesaid appellant is undertaking to and is discriminating against respondents in favor of said several persons, and is giving them unequal and unreasonable preference and advantage; that the course of appellant has resulted in, and will tend more to, the establishment of a monopoly in the warehouse and grain business at Pomeroy, and will stifle and restrain competitive business, to the great and irreparable injury of respondents, and to the detriment of the public.

The foregoing is an abbreviated statement of the ex-

tensive allegations contained in the application for a writ of mandate. A demurrer to the application was interposed, which was overruled, and appellant thereupon answered the application, denying many of its allegations, and alleging affirmatively, among other things, that said line of railway was constructed from Starbuck, Washington, to Pomeroy, Washington, in the year 1888, by the Oregon Railway & Navigation Company; that prior to the year 1894 said company constructed a side track on the north side of its main line of road in the city of Pomeroy, which side track was constructed entirely upon lands owned by said company, and acquired by it for the purpose of depot grounds; that said track was about 2,082 feet in length, and was constructed by said company at its own expense, for the purpose of affording yardage and switching facilities for the transaction of its business as a common carrier at its station at Pomeroy; that said track was at the time of its construction the sole property of said company, and continued so to be until August 16, 1896, when the ownership and possession thereof passed by sale to this appellant, the Oregon Railroad & Navigation Company, which is now the owner and in possession of the same; that at about the time of the construction of said track and afterwards warehouses were constructed by various persons, firms, and corporations contiguous thereto and upon portions of the depot grounds so owned by said Oregon Railway & Navigation Company, and by it leased to such persons, firms, and corporations, who constructed said warehouses; that this appellant has never permitted any person, company, corporation, or locality to connect a side track within the city of Pomeroy with its line of transportation for the accommodation of any mine, warehouse, elevator, mill, locality, or manufactory, and has never con-

structed any side or spur track within the city of Pomeroy for the accommodation of such; that a certain track was constructed by appellant at its expense, and entirely for the convenience and assistance of citizens of Pomeroy who had suffered heavy losses by fire, but that appellant derived no revenue therefrom. The allegations of the application in regard to trackage accommodations at other points than Pomeroy are denied. It is further averred that the site of the warehouse mentioned in respondents' application was located arbitrarily, and without notice to appellant, and without its knowledge or consent; that the lands upon which said warehouse is being constructed are not the lands of appellant, and the lands over which respondents desire the extension of appellant's line of road constructed are not the property of appellant; that, if the writ of mandate sought should be granted, appellant will be required to construct, maintain, and operate an extension of its present main line of railroad track 250 feet in length upon property not owned by it, will be deprived of ownership of the rails and ties used in the construction of the same, and will also be subjected to considerable expense in maintaining and operating the same. It is alleged that the said warehouse is a private enterprise, in which only respondents are interested, and that it would not in any way benefit the public; that the present warehouse system at Pomeroy located upon the grounds of appellant furnishes ample facilities for the receipt, storage, and shipment of all grain which, in the usual and ordinary course of business, is delivered at Pomeroy for storage or shipment during the course of any season; that the facilities furnished by appellant at Pomeroy for the receipt and shipment of grain are now, and have been ever since the 16th day of August, 1896, when it became owner of said railway line, suf-

ficient and ample for the handling of all grain or other freight offered at its station in Pomeroy for shipment to other points reached by its rail lines, or to carriers connecting with its lines. The answer concludes with the statement that for the foregoing reasons, if the writ of mandate should issue as prayed, it would amount to a taking of appellant's property without due process of law, and would also deprive appellant of the equal protection of the laws, contrary to the provisions of the fourteenth amendment of the Constitution of the United States. A reply to the answer was filed, which consists chiefly of denials. Appellant moved to strike the reply, and the motion was denied. Under issues substantially as stated above, the cause was tried by the court without a jury, and a judgment was entered directing the issuance of a writ of mandate commanding appellant within twenty days to furnish the material for and construct over the strip of land described an extension, spur, or side track to the warehouse of respondents. This appeal is from said judgment.

One hundred and fifteen separately stated assignments of error are set out in appellant's brief. It is manifestly impracticable to discuss them all in a comprehensive way. Under our views, we believe a discussion of a somewhat general nature will best serve the purposes of the case. It is urged that at the threshold of the case the demurrer to the application for the writ of mandate should have been sustained. The evidence is, however, before us, and we shall consider the case upon its merits, including reference to the evidence for that purpose. To support the application for the writ asked, respondents rely upon §§ 15 and 22 of article 12 of the Constitution of Washington, and upon a provision of a legislative act of 1897 as found in § 4322, Bal. Code. The sections of the constitution are as follows:

"Sec. 15. No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company, or individual, shall be delivered at any station, landing or port at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port or landing. Excursion and commutation tickets may be issued at special rates."

"Sec. 22. Monopolies and trusts shall never be allowed in this state, and no incorporated company, copartnership or association of persons in this state shall directly or indirectly combine or make any contract with any other incorporated company, foreign or domestic, through their stockholders, or the trustee or assignees of such stockholders, or with any copartnership or association of persons, or in any manner whatever, for the purpose of fixing the price or limiting the production or regulating the transportation of any product or commodity. The legislature shall pass laws for the enforcement of this section by adequate penalties, and in case of incorporated companies, if necessary for that purpose, may declare a forfeiture of their charter."

The statutory provision is as follows:

"It shall be unlawful for any railroad company or other common carrier doing business in this state, its agents or employees, on business wholly within this state, to make or give any unequal or unreasonable preference or advantage to any particular person or persons or company or corporation or copartnership or locality, or to any particular description of traffic in any respect whatever, or to subject any person or persons or corporation or company or copartnership or locality, or any particular description of traffic to any unequal or unreasonable prejudices or disadvantages in any respect whatever, and every railroad company or

other common carrier doing business in this state, which permits any person or persons or company or corporation or any locality in this state to connect a side track with its track or line of transportation for the accommodation of any mine or warehouse or elevator or mill or manufactory, shall accord the same right on the same terms to every other person or company or corporation or copartnership anywhere on its line in this state soliciting such right or privilege; this right shall be compelled by the courts of this state by the writ of mandate at the suit of any person or persons entitled to such right under this article: provided, that nothing herein contained shall prevent the classification of freight, as to kind, value and quality and the basing of rates thereon."

The statute was evidently intended to give active force to the constitutional provisions. It cannot be said that the makers of the constitution understood § 22, above quoted, to be self-executing, since they expressly provided that the legislature shall pass laws for its enforcement. Since the constitutional convention itself so interpreted the section, it is the manifest duty of the courts to adopt that interpretation. While § 15, quoted above, does not in terms expressly state that the legislature shall pass laws to enforce it, yet it relates somewhat to the same general subject-matter as § 22.

In *Long v. Billings*, 7 Wash. 267 (34 Pac. 936), this court held that § 16 of article 1 of the Constitution of Washington, which provides for the taking of lands for private ways of necessity, is not self-executing, and that, before the right to such taking can arise, the legislature must first define what are to be private ways of necessity, and must prescribe the method by which the necessary land can be taken. By analogy it would seem to follow that under the provisions of the sections above quoted the legislature must first define what shall be deemed to be "discrim-

ination in charges or facilities for transportation," and shall prescribe the method by which such discrimination shall be prevented. Acting upon that theory, the legislature enacted the provisions of § 4322, *supra*, and provided for the enforcement of its provisions by the writ of mandate. The legislature has, therefore, construed this section of the constitution as not being self-executing, and we think its construction the correct one. It follows that whatever rights the respondents have in the premises must be determined by the terms of the statute in so far as its terms give vital force to the constitutional provisions, and that the courts cannot enlarge upon the statutory provisions, even though the legislature might possibly do so within the constitutional limitations.

For the reasons hereinbefore stated, the next question for determination is, have the respondents brought themselves within the terms of the statute cited so as to entitle them to the relief asked? The relief sought is against what is claimed to be an unequal or unreasonable preference or advantage in relation to railway transportation facilities for warehouses. To warrant the writ of mandamus, there must exist a clear legal right to have a decision in respect to the thing sought. Wood on Mandamus (3d ed.), pp. 54, 55. The writ will not issue in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty then due at the hands of the party against whom relief is sought. High, Extraordinary Legal Remedies (3d ed.), § 12; *State ex rel. Piper v. Gracey*, 11 Nev. 223; *People ex rel. Butler v. Supervisors*, 26 Mich. 22; *People ex rel. Besse v. Village of Crotty*, 93 Ill. 180. Was appellant, at the time this application was made, in default in the performance of a clear legal duty

in the premises? It will be observed that the statute does not charge appellant with the absolute duty to permit others to connect side tracks with its track or line of transportation. That duty arises only when it has permitted such connections to be made, in which event it shall accord like facilities to others. It is not mandatorily provided that the policy of permitting such connections shall be inaugurated in the first instance, but, if a railroad company shall, of its own volition, establish such a policy by permitting connections of side tracks to be made, then it shall accord the same right, and on the same terms, to others who may solicit the privilege. The evidence in this case does not show that appellant has ever permitted any person, company, corporation, or locality in this state to connect a side track with its line of transportation for the accommodation of any warehouse. It does appear, however, that all its accommodations in the way of trackage facilities to warehouses are furnished by way of its own side tracks and connections constructed upon its own land. Under the statute there is, therefore, no duty now existing to permit persons to connect their side tracks with appellant's line. Respondents, however, do not seek to connect their own track, but they ask that appellant shall be required to construct a track leading to their warehouse, which is located upon their own private property. There is nothing in the statute which imposes upon appellant the duty to build such a track. If the statute in terms so provided, it would then become necessary for us to examine into the contention of appellant that such a requirement would be in contravention of the terms of the fourteenth amendment of the Constitution of the United States, in that it would amount to a taking of private property without due process of law, and to a denial of the equal protec-

tion of the laws. We need not enter upon that examination, however, since the statute, by its terms, does not purport to require the building of such side tracks for the accommodation of others, but is limited to the requirement that, when permission has been given to connect the side tracks of others, like permission shall be given to those who may thereafter apply, and on the same terms. The evidence shows that the location of respondents' warehouse is to the eastward of the present terminus of appellant's line of road, and to reach it with a track would require the extension of the line a distance of about 250 feet, and over land which does not belong to appellant. There is considerable evidence to the effect that the construction of such extension would require the removal and reconstruction of a platform now upon appellant's land, and used by it for loading and unloading heavy machinery. The site for the location of the warehouse was selected by respondents arbitrarily, and without any consultation with appellant, and without its knowledge or consent. Under these conditions a demand was made, about the time this cause was commenced, for the construction of the extension asked. No offer or tender of title to a right of way for the extension is alleged or shown to have been made at that time. Appellant was simply notified that respondents had secured the right of way and consented to an extension of the line over such property. They offered to do the grading, but demanded that appellant should furnish the necessary material and otherwise construct the extension upon this land over which they merely consented the extension might be made. After the proceeding was begun, and during the trial, they filed a deed for the right of way, but it was not an absolute tender, since it was conditioned upon the building of the extension. At the time of the demand

and at the beginning of the suit there was no showing that appellant could acquire the title to the land over which respondents demanded the construction of the extension. Under any view of the requirements of the statute, it certainly cannot be contended that appellant could have been required to build a track over land it did not own, or that it was under the duty to go out and buy a right of way for that purpose, not even knowing that such purchase could be made. Such was the situation at the time of respondents' demand and when the suit was begun. We think respondents' right to the writ of mandate must be fixed, in any event, by the nature of their demand. The subject-matter was such that appellant could not know that such an accommodation was desired, or the nature of it, until it was made known and specifically stated. Conceding, then, for the moment, that the statute may have the force contended for it by the respondents, still they were not in position to demand the writ when this action was begun, for the reason that appellant was not actually in default in the discharge of a duty properly demanded. But in no event do we believe that the statute can be construed as requiring appellant to extend its line of road in the manner and under the circumstances shown in this case and as detailed above. If it could be required to build 250 feet of extra road away from its own property and established grounds, then, in principle, why might it not be required to build a much greater distance, even to the extent of a mile or more? We shall not presume that such an intention existed in the legislative mind in the absence of a clear expression that such was intended.

It will be remembered that the affidavit alleges that at the time the above-mentioned demand for an extension was made an offer in the nature of an alternative was also

made in lieu of the extension demanded. The terms of the offer were to the effect that respondents would accept a lease of a stated portion of appellant's grounds contiguous to one of its side tracks now existing. The offer, was, however, conditioned that, if a lease should be made, it should, by its terms, provide that respondents should have "reasonable shipping facilities," and, further, that the leased premises must extend the full width of appellant's lands to the northward. There was no specification of terms as to what respondents deemed to be reasonable shipping facilities, or as to what they would demand or require in that particular. It was, therefore, impossible for appellant to know from the offer what would be expected of it in the premises suggested by the offer to accept the lease. Even if the duty arose under the statute for appellant to grant a lease to respondents because of the existence of leases to other warehousemen upon appellant's lands, still what occurred in reference to a lease was a mere offer, and not a demand, and the offer was of such an indefinite nature, even if it had been in the form of a demand, that we think no duty arose to comply with it. The thing actually demanded was an extension of the line, and not a lease. There is much evidence in the record to the effect that the moving of appellant's cars in its necessary operations upon its depot grounds would become so involved if cars should be placed for the accommodation of a warehouse upon the proposed lease site that it would endanger the persons of its employees so conducting the operation of cars. Be that as it may, however, for reasons stated above we do not think a writ of mandate can issue in this action compelling the execution of a lease.

We do not think the evidence shows that a monopoly

in the warehouse business exists at Pomeroy within the meaning of the constitutional sections quoted above or of the statute cited. It appears that for years various persons have owned and operated warehouses located upon appellant's lands at that point. At the time this suit was begun and tried four separate warehouses were in operation there, and only a few weeks before that time respondent Cluster had owned an interest in two warehouses at Pomeroy, which he had sold. Respondents have the undoubted commercial and legal right to enter into competition with other warehousemen, but it seems to be their misfortune that they have built a warehouse so located that they have not the facilities for shipping therefrom which they desire. It does not necessarily follow, however, that they may not be entitled under the statute to the same facilities and upon the same terms that are accorded to other warehousemen, unless it should appear that the same cannot be furnished within reasonable conditions. This action was so brought, however, as we have seen, that we cannot now determine what rights respondents may have in that regard, if any.

The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to enter judgment denying the writ of mandate.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4689. Decided July 14, 1903.]

DARROW INVESTMENT COMPANY, *Respondent*, v. ARTHUR
A. BREYMAN, *Appellant*.

REAL ESTATE BROKERS — AGENT FOR SELLER AND PURCHASER — ACTION
FOR COMMISSIONS — INSTRUCTIONS.

In an action by a broker to recover commissions upon a sale of real estate, the refusal of the court to instruct the jury that plaintiff could not recover if they should find that, in making the sale, he was acting as agent for the purchaser as well as for the defendant, and that defendant was not informed of that fact, was not error, when it appeared from the evidence that defendant was aware that plaintiff was acting as agent for both parties.

Appeal from Superior Court, King County. — Hon.
ARTHUR E. GRIFFIN, Judge. Affirmed.

Allen, Allen & Stratton, for appellant:

The rule which prohibits an agent from acting for both seller and buyer equally forbids him from having any personal interest in the sale other than the commission. *Martin v. Bliss*, 10 N. Y. Supp. 886; *Tyler v. Sanborn*, 4 L. R. A. 218.

Moore & Farrell, for respondent:

When the broker is a mere middleman, without any discretion, but bound to find a purchaser who is ready, willing and able to buy the property upon the terms fixed by the seller, he can contract for and recover compensation from both parties. *Orton v. Scofield*, 61 Wis. 382; *Shepherd v. Hedden*, 29 N. J. Law, 334; *Mullen v. Keetzel*, 7 Bush, 253; *Wyckoff v. Bliss*, 12 Daly, 324; *Green v. Robertson*, 64 Cal. 75; *Siegel v. Gold*, 7 Lans. 177.

July, 1903.] Opinion of the Court—MOUNT, J.

The opinion of the court was delivered by

MOUNT, J.—This is an action to recover commissions on a sale of real estate. The complaint alleges, in substance, that in January, 1902, defendant employed plaintiff to find a purchaser of certain real estate at a specified price and terms, and agreed, if plaintiff found such a purchaser, to pay plaintiff a commission of five per cent. on the purchase price; that plaintiff did find a purchaser ready, able and willing to buy on the proposed terms; and that defendant then refused to sell and to pay the agreed commission. The answer was a general denial. Upon a trial the jury found in favor of the plaintiff, and from a judgment on the verdict defendant appeals.

The only question on this appeal is based upon the refusal of the trial court to instruct the jury that if they should find from the evidence that the plaintiff, in making the proposed sale, was acting as agent for one King, the proposed purchaser, as well as for the defendant, and that the defendant was not informed of that fact, then plaintiff could not recover. The rule is that, where an agent or broker is in the secret employment of both parties he cannot recover from either. *Shepard v. Hill*, 6 Wash. 605 (34 Pac. 159); *Mechem, Agency*, §§ 953, 972. But this rule does not apply where the seller is fully informed of the relation of the agent to the purchaser. *Mechem, Agency*, § 972; *Chase v. Veal*, 83 Tex. 333 (18 S. W. 597); *Scott v. Lloyd*, 19 Colo. 401 (35 Pac. 733). The agent testified, in substance that, in case of a sale, he was to have control of the property and plat it and sell it again for the purchaser, and that he had agreed with the purchaser, also, to divide with him the commissions on the present sale; that the respondent heard the conversation and understood it. Mr. S. E. King, who desired to purchase the property, testified as follows:

"Q. As a matter of fact, Darrow was acting as your agent in this purchase, as well as Breyman's in the sale? A. Yes. Q. Do you know whether Mr. Breyman was informed of that fact, or not? A. I don't know, but I rather think so. Yes. He understood that I was going to let the Darrow Investment Company handle the property. Q. Was that stated there? A. Yes."

The appellant went upon the stand as a witness in his own behalf, and did not controvert this evidence. If he had testified that he did not know that the respondent was acting as agent for both himself and the purchaser, then there would have been an issue for the jury upon this point, and the refusal of the court to give the instruction would have been error. But where no issue of fact arose upon the question, the lower court was justified in refusing the instruction.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4706. Decided July 14, 1908.]

GEORGE W. CARMACK, *Appellant*, v. KATIE DRUM *et al.*,
Respondents.

PAROL EVIDENCE — VARIATION OF WRITTEN INSTRUMENT — RULE AS TO
THIRD PARTIES.

Evidence of an oral agreement contemporaneous with a deed of conveyance, whereby the grantor was given the right to collect the rents of the premises for a stipulated period after conveyance, is admissible in an action by him to recover such rents, since the rule prohibiting the variation of written instruments by contemporaneous oral agreements applies only to the parties thereto and not to third persons.

July, 1903.] Opinion of the Court—MOUNT, J.

UNLAWFUL DETAINER — SUPERSEDEAS ON APPEAL — LIABILITY ON BOND — EFFECT OF SATISFACTION OF JUDGMENT.

The fact that judgment in favor of plaintiff in an action of unlawful detainer had been satisfied after affirmance on appeal would not release liability upon a supersedeas bond given for the protection of plaintiff pending the appeal.

Appeal from Superior Court, King County.—Hon. WILLIAM R. BELL, Judge. Reversed.

Metcalf & Jurey, for appellant.

Hastings & Stedman, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an action to recover upon a supersedeas bond given in a case on appeal to this court. Plaintiff was nonsuited by the lower court, and appeals from a judgment thereon.

The facts in the case are substantially as follows: Respondents Drum & Morgart were tenants from month to month of certain real estate belonging to appellant. On April 2, 1901, appellant brought an action for unlawful detainer against his tenants, Drum & Morgart, for the possession of the premises. A trial was had on June 25, 1901, in said action, and a verdict was rendered in favor of plaintiff for restitution of the premises, and for \$300 rent to July 1, 1901. Judgment was rendered on this verdict on July 2, 1901. On June 26, 1901, six days before the judgment was rendered in the lower court in the unlawful detainer action, the appellant, who was plaintiff in that action, sold and (by general warranty deed) conveyed the real estate in question to his wife, as her sole and separate property, expressing a consideration of \$5 and love and affection. After the habendum clause, the deed recites as follows:

"It is understood that the above described real property is now the separate property of the said first party [George W. Carmack] and the intent, purpose and effect of this conveyance is and shall be to vest the same in the said second party [Marguerite Carmack] as her sole and separate property and free and clear of all right, title, interest and control of the said first party and of all community rights and interests whatsoever of the said parties hereto."

Drum & Morgart, after the entry of the judgment rendered on July 2, 1901, appealed therefrom to this court, and gave a statutory supersedeas bond for stay of proceedings pending the appeal. This bond was in the penal sum of \$1,000, with the respondent in this action, the American Bonding & Trust Company, as surety, and was conditioned, among other things, to "pay all rents or damages to any property accruing during the pendency of the appeal out of the possession of which respondent shall be kept by reason of the appeal." By virtue of this bond, Drum & Morgart kept possession of the premises pending the appeal in that case. The judgment was affirmed on appeal (*Carmack v. Drum*, 28 Wash. 472, 67 Pac. 808) and a remittitur filed in the lower court on March 26, 1902. On April 7, 1902, after the filing of the remittitur, the defendants in this action paid into the registry of the trial court the amount of the judgment and costs as required by the remittitur from this court, and the appellant in this action drew the amount so paid, and acknowledged satisfaction of the judgment. Prior to the filing of the remittitur, and on the 18th day of March, 1902, Drum & Morgart voluntarily surrendered to appellant the possession of the premises, but refused to pay to appellant any rent therefor or damages thereto accruing during the pendency of the appeal, from July

July, 1903.] Opinion of the Court—MOUNT, J.

1, 1901, to March 18, 1902. This action is upon the supersedeas bond on appeal above referred to, to collect the rents and damages to the property held by Drum & Morgart from July 1, 1901, to March 18, 1902.

Upon the trial of this case in the court below, after the appellant had introduced in evidence the deed from himself to his wife, conveying the property to her, he offered to show that, at the time of the conveyance to her, and as part consideration therefor, he and his wife had an oral agreement to the effect that appellant should retain possession of the property and the right to collect the rents thereof until January 1, 1903. This evidence was excluded by the trial court upon the ground that it contradicted and varied the terms of the written deed. The appellant, however, was permitted to testify, and did testify, in substance, that subsequent to the delivery of the deed he had such an agreement with his wife; but upon cross-examination he said that the agreement was made about the time the deed was executed, and was a part of the same transaction. Thereupon the court, on motion, struck out all of that evidence, basing this ruling upon the former one that it varied and contradicted the terms of the deed, which was the culmination of the contract between appellant and his wife. Appellant thereupon offered to prove by his wife, the grantee in the deed, that there was an oral agreement that appellant should have the rents.

Counsel for respondents argue that, since this is an action on the bond, and since the bond was given to protect the appellant, who was respondent in the action in which the bond was given, for rents or damages accruing during the pendency of the appeal, out of the possession of which the respondent was kept by reason of the

appeal, and since appellant had sold the property to a third party before the appeal was taken, therefore there was no liability upon the bond. It is said in the brief: "The respondents do not deny their relation of landlord and tenant to the appellant prior to the making of the said deed, but they do deny any such relation after the making and delivery of such deed, and further deny any liability on said bond to appellant." This position is clearly correct, where the appellant sells the property either before or after the appeal, and transfers possession or right of possession to another and retains no further interest therein, because, after transfer of possession or right thereof to another, the interest of the grantor would cease, and the tenants would no longer be his tenants, or liable to him for rents or damages, but would be liable to the purchaser subsequent to the transfer. Otherwise the tenants would become liable for double rent, which cannot be. The only question, therefore, in this case is, did the trial court err in excluding evidence of the right of appellant to collect the rent under an oral agreement made at the time of the deed. The answer to this question depends upon the right of appellant to show the real transaction between himself and his wife, even to the extent of varying or contradicting the terms of the deed executed to his wife. The rule is well settled that, as between the parties to a written contract, parol evidence cannot be received to contradict or vary the terms thereof. But this rule does not apply to persons not parties to the contract. The rule is stated as follows in 1 Greenleaf on Evidence (16th ed.), § 279:

"The rule under consideration is applied only (in suits) between the parties to the instrument; as they alone are to blame if the writing contains what was not intended, or omits that which it should have contained.

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It cannot affect third persons, who, if it were otherwise, might be prejudiced by things recited in the writings, contrary to the truth, through the ignorance, carelessness, or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others."

In 21 Am. & Eng. Enc. Law (2d ed.), 1103, the rule is stated thus:

"The rule applies only to controversies between the parties or their representatives and privies, and to cases where the enforcement of the instrument is the gravamen or substantial cause of action. It has no application to strangers, for one not connected in any way with the agreement may show by parol what the real transaction was, even in a contest with one of the parties. And inasmuch as a stranger is not bound by the rule, even in a controversy with a party to the transaction, it follows that in a controversy with strangers to the instrument the parties to it are not themselves estopped to explain or contradict it by parol evidence."

To the same effect are the following authorities: 2 Parsons, Contracts (8th ed.), p. 672, *p. 556; Brown, Parol Evidence, § 28; *Darby v. Arrowhead, etc., Hotel Co.*, 97 Cal. 384 (32 Pac. 454); *Bank of California v. White*, 14 Nev. 373; *Strader v. Lambeth*, 7 B. Mon. 589; *Busch v. Pollock*, 41 Mich. 64 (1 N. W. 921).

Under this rule it seems clear that the appellant should have been permitted to show the real transaction between himself and his wife. These respondents were not parties to the deed. The character of the contract did not concern them so long as their rights were not interfered with. The appellant was at liberty to sell the property to another, and retain possession thereof and collect the rents, and under such a contract his former relation with the respondents as landlord would not be changed. They

would be liable to him for the rent so long as his right to collect it continued. The respondents were certainly liable to the appellant for the rent of the premises during the time of their tenancy while the appellant was entitled to receive it. The bond was expressly given as security therefor. It was not necessary that appellant, to be entitled to collect the rents, should be the legal owner of the fee. *Capital Brewing Co. v. Crosbie*, 22 Wash. 269 (60 Pac. 652).

If both the owner of the fee and the appellant, who had parted therewith, agree that the appellant was entitled to the rent, and that his relation to the respondents as landlord was not changed, no rights or liabilities of respondents were in any way changed, for under such circumstances, if the rent were paid to the appellant, his grantee could not again enforce payment thereof. The fact that the judgment in the unlawful detainer action was satisfied did not release the liability upon the bond. *Carmack v. Drum*, 28 Wash. 472 (68 Pac. 894).

For these reasons, we think the court erred in excluding the evidence offered. The judgment is therefore reversed, and the cause remanded for a new trial.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

ON PETITION FOR MODIFICATION.

PER CURIAM.—In this case, after the lower court had granted a nonsuit as to plaintiff's cause of action, the court proceeded to determine the merits of certain counterclaims pleaded by defendants, and the judgment thereon was adverse to defendants, respondents here. No appeal was taken from that portion of the judgment. The appeal was taken by the plaintiff from that part only of

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Syllabus.

the judgment wherein it was ordered that plaintiff take nothing by his complaint. The clause in the main opinion, "that the judgment is therefore reversed, and the cause remanded for a new trial," was intended to apply only to that part of the judgment which the plaintiff appealed from. We did not intend to reverse any part of the judgment not appealed from. The opinion is modified so as to read: The judgment is reversed, and the cause remanded to the lower court for a new trial, upon the cause of action stated in the complaint.

[No 4710. Decided July 14, 1903.]

A. M. CANNON *et al.*, *Plaintiffs*, v. BEN E. SNIPES *et al.*,
Defendants, FRANK McCANDLESS, *Appellant*, P. J.
GRAY, *Receiver, Respondent*.

RECEIVERS — PLURALITY OF FUNDS — PAYMENT OF CLAIMS.

A receiver appointed to take charge of the separate, community and partnership estates of an insolvent debtor, under a decree providing for the payment of each class of creditors primarily from the corresponding class of funds, cannot be compelled to pay a separate debt of the insolvent out of funds derived solely from the community estate of himself and wife, when it appears that the claims against that estate have not been satisfied.

SAME — FUNDS AVAILABLE FOR RECEIVERSHIP EXPENSES.

Where but one receivership has been created to take charge of the partnership, community and individual estate of an insolvent debtor, funds derived from any of such estates are properly applicable toward payment of the expenses of the receivership.

Appeal from Superior Court, Kittitas County.—Hon.
FRANK H. RUDKIN, Judge. Affirmed.

Kauffman & Frost, for appellant.

Eugene E. Wager, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant petitioned the superior court of Kittitas county for an order directing the receiver of the estate of Ben E. Snipes to pay a certain judgment against said Snipes, which, by assignment, is held by appellant. The judgment is for the separate and individual obligation of Ben E. Snipes. The receivership includes all the estates of Ben E. Snipes individually, the partnership of Ben E. Snipes & Co., and the community estate of Ben E. Snipes and wife. The petition asks that the receiver shall be ordered to pay the judgment from funds now in his hands, from whatever source derived. The receiver, respondent herein, answered the petition alleging that all funds now in his hands have been derived solely from the sale of the community real property of Snipes and wife, and from the rents, issues, and profits thereof; that by a judgment of said court made and entered on the 14th day of June, 1900, it was decreed that the claim of appellant mentioned in the petition herein is not a lien upon, and cannot be paid out of, the proceeds of the sale of the community property of Snipes and wife, or from the rents, issues, and profits thereof, which judgment and decree was on appeal affirmed by this court, as reported in *Cannon v. Snipes*, 24 Wash. 166 (64 Pac. 167). At the hearing of the petition herein the court found that all moneys now in the hands of the receiver were derived from the proceeds of the sale of the community property of Snipes and wife, and from the rents and profits thereof, and entered judg-

July, 1903.] Opinion of the Court—HADLEY, J.

ment denying the petition. This appeal is from that judgment.

It is urged by appellant that his petition avers and that the facts show conditions now existing which were unknown to him at the time of the hearing in *Cannon v. Snipes, supra*. We have examined the record and the opinion in that case, and we are unable to see that any principle is involved here that was not determined by the former appeal. In the former opinion, at page 168, this court observed:

"In January, 1897, a final decree was entered in the said cause, by which the court fixed the claims of all the various classes of creditors, marshalled and listed all the assets then in the receiver's hands, and directed a sale thereof and the payment of the various claims, according to their character out of the proceeds of the various kinds of property, which consisted of partnership assets of Ben E. Snipes & Co., community property of Snipes and wife, and individual assets of Snipes. This decree is final in the cause, not having been vacated, modified, or appealed from, and this appeal in no way questions the validity or binding force of that decree."

Again, at page 171, it was further said:

"It is not alleged that the receiver has not applied these funds as directed by the decree. As we read the decree, it was intended by the court that all firm liabilities of Snipes & Co., and all community liabilities of Snipes and wife should first be paid out of the proceeds of the community realty and firm property, and that the balance be applied in satisfaction of the separate debts of Snipes. It stands admitted here that the receiver is about to pay these claims out of the proceeds of the sale of the community property, and that prior claims against this fund remain unpaid, and that the total assets will not be sufficient to liquidate the same."

It does not appear here that since said opinion was rendered the receiver has applied, or that he is about to apply, the funds in his hands in any other manner than as directed by said decree. That decree, as we have seen, was formerly held to be of a final and binding force. It classified the creditors, and directed their payment in such a manner that appellant's claim is not to be paid from community property until the partnership and community liabilities of Snipes are first paid. It is manifest from the petition before us that the two classes of claims last mentioned are not yet paid, and that sufficient funds do not exist to satisfy them. The receiver is therefore following the terms of the decree in refusing to pay appellant's claim from the community funds in his hands. It is insisted that there has been a misappropriation of funds in the payment of the expenses of the receivership, in that the several funds have been commingled, and the expenses paid from such common fund. The same question was raised in *Cannon v. Snipes*, and it was held that while the funds are not common for the use of each creditor, or each class of creditors, yet there is but one receivership, and that any or all of the funds are available to pay receivership expenses. The said decree so provided, and this court said "this was a proper provision in the decree."

These questions having been determined by the former appeal, we think the judgment of the court in this case was right, and it is therefore affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4475. Decided July 15, 1903.]

PHILENA McKEE, *Executrix, Respondent*, v. GEORGE
WASHINGTON McKEE *et al.*, *Appellants*.

ACTIONS — VOLUNTARY DISMISSAL — RIGHTS OF DEFENDANT ASKING
AFFIRMATIVE RELIEF.

In an action brought for the construction of a will and to quiet title thereunder, in which the defendants answered setting up affirmative matter and asked affirmative relief, the plaintiff is not entitled to a voluntary dismissal carrying with it the affirmative matter of the answer.

SAME — DEFAULT — APPEAL — DECISION.

Where motions of the plaintiff for a voluntary dismissal and of the defendants for default and judgment upon affirmative matter in the answer are heard at the same time, and the plaintiff's motion is erroneously granted, the supreme court upon reversing the judgment will not direct the default to be entered, but will remand with instructions to reinstate the case and proceed to a hearing, including defendants' motion for default.

Appeal from Superior Court, Walla Walla County.—
Hon. THOMAS H. BRENTS, Judge. Reversed.

John H. Pedigo and *Sharpstein & Sharpstein*, for appellants.

Marvin Evans and *Wellington Clark*, for respondent.

PER CURIAM.—The respondent, who was plaintiff below, commenced an action in the superior court of Walla Walla county, averring, in substance, that she was the executrix and devisee of a certain will left by her deceased husband; that doubts and controversies had arisen as to her rights and title thereunder, and that she was unable to carry into effect the bequests made by the maker of the will because of these doubts and controversies. She prayed that she have the aid of the court in the construction of the

will, that her title to the property devised be quieted, and that she have such other relief as the court should deem just and equitable. The defendants answered, denying many of the averments of the complaint, and setting up affirmative matter on which they prayed for affirmative relief. After these answers had been filed and served, the respondent moved to dismiss the action without prejudice, and at her cost. While this motion was pending the appellants moved for judgment by default upon the affirmative matter alleged in the answers. These motions came on for hearing together, when the trial court ruled that the respondent was entitled to dismiss her action, and that the dismissal carried with it the affirmative matter set up in the answer, and thereupon entered the following judgment:

“And after argument of counsel upon said motion of the said plaintiff and the submission thereof by them, the court sustains said motion and dismisses this action at the cost of said plaintiff, without prejudice to the said defendants to bring an action embodying the alleged cause of action set up in their answers and cross-complaints herein, and declines to take further action in the premises.”

This appeal is from the judgment of dismissal.

The appellants do not question the right of the respondent to abandon her cause of action at any stage of the proceedings, and have a dismissal thereof, so far as she is concerned; but they contend that they, having set up affirmative matter and prayed for affirmative relief, have the right to have the judgment of the court thereon as to the sufficiency of such affirmative matter to state a cause of action against the respondent, and a trial thereon, if adjudged or conceded to be sufficient, and that the abandonment or dismissal by respondent of her own cause of action does not operate as a dismissal of the cause of action

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set up by themselves. In *Waite v. Wingate*, 4 Wash. 324 (30 Pac. 81), this court held that the original complaint in an equitable action and a cross complaint filed as a defense thereto constituted but one suit, even though affirmative relief be asked in the cross complaint, and that a dismissal of the original complaint carries the cross complaint with it. In the comparatively recent case of *Washington National Building, etc., Ass'n v. Saunders*, 24 Wash. 321 (64 Pac. 546), however, we held that the rule announced in the case of *Waite v. Wingate* was not in consonance with the spirit of the Code, nor in accordance with the better authorities, and overruled the same. The rule now is, therefore, that when the answer of the defendant to a complaint in an action of equitable cognizance contains averments of fact connected with the subject-matter of the action set out in the complaint, which, if true, will afford affirmative relief, a dismissal of the original complaint will not carry with it the affirmative matter of the answer. Tested by this rule, the action before us should not have been dismissed. The answers of the appellants set up affirmative matters and prayed for affirmative relief. They therefore had the right to the judgment of the trial court as to their sufficiency to warrant an affirmative recovery on their part, and a judgment for the relief demanded, if the allegations should be found sufficient, and should be proved by a preponderance of the evidence if issue be taken thereon.

The appellants moved in the court below for default on their answers, and urge here that the cause be remanded with instructions to grant the default. But, as the trial court dismissed the action on the respondent's motion before reaching the motion for default, the cause will be remanded with instructions to reinstate the case, and pro-

ceed regularly with its subsequent hearing, which will include an investigation of the appellants' right to a default. The judgment appealed from is reversed, and the cause remanded with instructions to proceed in accordance with this opinion.

[No. 4555. Decided July 15, 1903.]

CHILDS LUMBER AND MANUFACTURING COMPANY, *Appellant*, v. FLORA R. PAGE *et al.*, *Respondents*.

CONTRACTS — CONSTRUCTION — ARBITRATION.

A single clause of a building contract giving the owner the right to fix the amount of the damages owing to delay, and, upon dissent by the contractor, requiring arbitration, must be construed in connection with the other clauses, and does not limit the arbitration to that point, where it is apparent that all matters in dispute are to be arbitrated.

SAME — PLEADINGS — ADMISSIONS IN REPLY.

Where the contract permits the owner to fix the damages for delay and requires arbitration if the contractor dissents, and the reply admits that the damages were fixed, the plaintiff cannot avoid the effect of such admission by showing that the delay was not its fault, that the time had been extended, or that the claim was in bad faith, where those defenses had not been submitted to arbitration or any attempt made to arbitrate; and judgment is properly given on the pleadings for the amount claimed, less the damages fixed.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

Crow & Williams, for appellant:

The reply shows a sufficient excuse to relieve the appellant from any liability by reason of delay. *Bardwell v. Ziegler*, 3 Wash. 34; Lloyd, Law of Building, §§ 39, 40;

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Palmer v. Stockwell, 75 Mass. 237; *Weeks v. Little*, 89 N. Y. 566; *Taylor v. Renn*, 79 Ill. 181; *Stewart v. Keteltas*, 36 N. Y. 388; *Davis v. Crookston Water Works Co.*, 47 Am. St. Rep. 622; *White v. School District*, 28 Atl. 136; *Ketchum v. Zeilsdorff*, 26 Wis. 514; *Abbott v. Gatch*, 71 Am. Dec. 635; *Norton v. Browne*, 89 Ind. 333; *De Boom v. Priestly*, 1 Cal. 206; *McCausland v. Cresap*, 3 G. Greene, 161.

Graves & Graves, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is a second appeal of this cause. The opinion on the former appeal will be found in 28 Wash. 128 (68 Pac. 373), where will be found, also, a full statement of the pleadings in the cause, and the facts giving rise to the controversy between the parties. After the cause had been remanded on the former appeal, the plaintiff (appellant here) amended its reply, in which it substantially admitted the allegation in the defendant's answer to the effect that it had failed to deliver the materials agreed to be furnished at the time named in the contract, and that the defendant A. J. Page had determined the amount of the loss and damage sustained by the defendants thereby in the sum of \$515, and had served written notice thereof on the plaintiff, but sought to avoid the effect of the admission by pleading certain matters in defense thereof, which may be epitomized as follows: (1) That whatever delay occurred was caused by the defendants; (2) that the delay was not caused by any fault of the plaintiff; (3) that time of performance had been extended by the mutual agreement of the parties, though not for the entire time of the delay; (4) that prior to the institution of this action the plaintiff had brought an-

other action involving the same subject-matter as this, and that before the institution of that action the defendant had claimed that his damages amounted to the sum of \$250, but that when that action was instituted he served upon the plaintiff a written claim for damages in the sum of \$515 because of delay, and \$150 because of defective materials; (5) that neither of such claims were the result of investigation or computation by defendant, but were made capriciously, and in bad faith; and (6) that when the complaints were made the plaintiff gave notice that it dissented therefrom. On the filing of this reply the defendant moved for judgment on the pleadings, when the trial court held that, as a matter of law, the plaintiff could recover only an amount equal to the excess of its claim over \$515, and entered judgment for the plaintiff accordingly. The plaintiff again appeals from the judgment.

The appellant insists that one clause alone of the contract entered into between the parties, viz., article 8 (28 Wash. 132, 68 Pac. 373), is applicable to the matter now in dispute between them, and that this clause authorizes the owner to fix the amount of the damage caused by delays only, which alone it is required by the contract to arbitrate; and that it is open to it to litigate in the courts the question of its liability for such damage, and hence it has the right to litigate in the courts the several matters set out in its reply as a defense to the claim. Reading article 8 of the contract by itself, some support, doubtless, can be found for this contention; but it is a familiar principle that a contract must be read as a whole, and its meaning gathered from the whole instrument, and not from any particular part thereof. So reading this contract, there is little doubt as to its meaning. However awkward or cumbersome its language may be, it is clear that it was in-

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tended that, should there be any delay on the part of the appellant in fulfilling its part of the contract, the defendant A. J. Page should have the right to determine the amount of damages suffered by the owners thereby, and the right, if the claim should be disputed by the appellant, to have all the matters pertaining thereto settled by arbitrators, selected as provided in the contract. No doubt the appellant could have defended against the claim before the arbitrators by showing that the delay was not its fault, that it was the fault of the owner, that the time had been extended, that the claim made was capricious, and in bad faith, or, perhaps, for other reasons stated in its reply; but it was before that board these defenses must be made. It was the intention of the contract that all matters of dispute concerning the performance of the contract that should arise between the parties should be settled by arbitration, and, as this court has repeatedly held, disputes which a party has agreed to submit to arbitration cannot be litigated by him in the courts without first showing that he has offered to arbitrate pursuant to the agreement, and has been refused by the other party. In its amended answer the appellant prayed that the court, if it found that the defendants were entitled to offset their claim of damages against the amount due the appellant, "that this action, as to such claim, be dismissed without prejudice, for the purpose of having the question of such damages referred to a board of arbitrators, as provided for by said contract." It now complains that the trial court in its decree made no order in reference thereto, and asks this court, in case the decree is affirmed in other respects, to provide that the decree shall not prejudice the right to an arbitration in the future. But it seems to us that, if the appellant is barred of the right to arbitrate the

claim for damages in some future proceeding, it is because of its conduct, rather than by the form of the decree entered, and, without now determining the question one way or the other, as we think it is not before us, we decline to alter the form of the decree.

Other questions suggested by the appellant are concluded by what we have said above, and, as we find no error in the record, the judgment will stand affirmed.

MOUNT, HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4598. Decided July 15, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. GEORGE D.
CARPENTER, *Appellant*.

CRIMINAL LAW — EVIDENCE — ADMISSIONS.

Admissions of accused at the preliminary examination, upon being asked by the magistrate whether or not he had any testimony to offer, are not made under the influence of fear produced by threats, and evidence of the same is admissible, although the witnesses did not say in words that they were not made under the influence of fear.

SAME.

Evidence of admissions by accused is admissible where the jailer testifies that no inducements were held out to the accused, and that they were made in the presence of his wife when she was visiting him in the jail.

RAPE — EVIDENCE OF OTHER CRIMES — IMPEACHING CHARACTER.

Upon the charge of rape of defendant's daughter, where the defendant's general character has been put in issue, and his wife has testified on cross-examination that a daughter other than the one named in the information never told her that the accused had attempted to commit the crime of rape upon her, it is error requiring a reversal to permit the state to impeach the defendant's character by evidence of a specific crime other than the one for which he is on trial.

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| 32 | 254 |
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| 32 | 254 |
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SAME.

Neither is it competent to rebut his wife's testimony by evidence of the daughter to the effect that defendant had attempted to have sexual intercourse with her, as the state is concluded by answers on cross-examination pertaining to collateral matters.

REASONABLE DOUBT.

An instruction as to reasonable doubt approved (following *State v. Krug*, 12 Wash. 288).

Appeal from Superior Court, Lewis County.—Hon. ALONZO E. RICE, Judge. Reversed.

Frank Burch, for appellant.

Maurice A. Langhorne, Prosecuting Attorney, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant was informed against for the crime of rape, alleged to have been committed upon the person of one Georgie Carpenter, his daughter, a female child under the age of eighteen years. He was found guilty on a trial had thereon, and appeals from the judgment of conviction and the sentence pronounced against him.

It is first assigned that the court erred in permitting W. A. Westover and J. C. Matson, witnesses for the state, to testify to certain statements, in the nature of admissions, made by the appellant at his preliminary examination. It is not contended that there was anything in the statements themselves that rendered them inadmissible, but it is said that the state did not first show that the admissions were not made under the influence of fear produced by threats. But we think the appellant has mistaken the effect of the record. While it is true that the witnesses did not use the words of the statute in detailing the circumstances under

which the admissions were made; that is, they did not say in words that the admissions were not "made under the influence of fear produced by threats," yet they did so in effect. They testified that the admissions were made at the close of the state's case before the committing magistrate, when the magistrate inquired of the appellant whether or not he had any witnesses or testimony to offer on his own behalf. Clearly, there was here evidence that the admissions were not made under the influence of fear produced by threats, even if it be conceded that the statute requires such a showing to be made before an admission made by a defendant at a preliminary hearing can be introduced in evidence against him—a question we do not decide.

In this same connection, and for the same reason, it is assigned that the court erred in permitting the jailer to testify to other admissions made by the appellant. This assignment seems to us to be equally without merit. The jailer testified that no inducements were held out to the appellant in order to get him to make the statements he did make, and that they were made in the presence of the appellant's wife at a time when she was visiting him in the jail.

On the trial, while the wife of the appellant was on the stand, testifying on his behalf, she was asked on her examination in chief concerning the conduct of the appellant towards the members of his family generally, and answered to the effect that he had always conducted himself towards his family as a good husband and father should. On cross-examination she was asked if it was not a fact that their daughter Annie had told her that the appellant had attempted to commit the crime of rape upon her (Annie), to which she replied that Annie had never told her anything of the kind. In rebuttal the state put Annie on the stand,

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and was permitted, over the objection of the appellant, to ask her the following question: "What is the fact as to your father attempting rape upon you?" The witness answered to the effect that her father had on several occasions endeavored to induce her to have sexual intercourse with him. The appellant contends that this was error requiring a reversal of the judgment, and we think the contention must be sustained. The state could not show as a fact, in order to contradict the testimony of the wife to the effect that the appellant had always demeaned himself as a good husband and father, that he had been guilty of a crime against a daughter other than that charged in the information. The statement that he had always properly demeaned himself towards his family might in a remote degree tend to show that he was a peaceable and law-abiding man, and so far put his character in issue as to permit the state to introduce impeaching testimony as to his general character in that regard, but this is as far as the rule could possibly go. No rule permits the general character of the defendant, even when directly put in issue, to be impeached by showing the commission by him of a specific crime other than the one for which he is on trial. Neither was it competent to contradict the statement of the wife to the effect that her daughter Annie had never told her that the appellant had attempted a rape upon Annie. No rule is better settled than the one that a cross-examining party is concluded by the answer which a witness makes to a question pertaining to a collateral matter. To such answers no contradiction is allowed, even for the purpose of impeaching the witness. *State v. Payne*, 6 Wash. 563, 568 (34 Pac. 317); 10 Enc. Pl. & Pr. 294, and cases cited. But the question permitted by the court in this instance went much farther than an impeaching question.

The wife was asked whether or not Annie had told her that the appellant had committed a certain act, while Annie was asked whether or not the appellant had committed the act, not whether she had told her mother so. Had it been proper, therefore, to have impeached the statement of the mother when she stated that Annie had never told her of the alleged misconduct of the father, it would have been improper and reversible error to have permitted Annie to answer the question complained of.

Exception was taken to the instructions of the court where it defined a reasonable doubt. The charge, however, was substantially like that approved by this court in *State v. Krug*, 12 Wash. 288 (41 Pac. 126), and we think was entirely unobjectionable. Other errors assigned relate to questions of practice which will not recur on a retrial of the cause, and it is unnecessary to notice them here.

The judgment appealed from is reversed, and the cause remanded for a new trial.

HADLEY, ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4645. Decided July 15, 1903.]

EDMUND C. TRAVES, *Appellant*, v. JOHN C. McLEES *et al.*, *Respondents*.

APPEAL — DISMISSAL — CESSATION OF CONTROVERSY.

Where, pending an appeal, the parties thereto enter into such an agreement that an end is put to the controversy between them, with the exception of the question of costs, the appeal will be dismissed.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Appeal dismissed.

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Kerr & McCord and *Million & Houser*, for appellant.

Thomas Smith and *James C. Waugh*, for respondents.

PER CURIAM.—This was an action to remove a cloud from the title to certain real estate. Upon a trial the lower court entered a decree adjudging that the plaintiff was the mortgagee of the property, and ordered the lands in controversy to be sold, and the proceeds thereof applied in satisfaction of plaintiff's lien, and the remainder turned over to the defendants. From this decree the plaintiff appeals.

It now appears that, after the appeal was taken, the parties voluntarily sold the lands in question to a third party, and have executed deeds therefor, and have received and divided the proceeds of the sale in accordance with the decree of the lower court. It further appears that there is no controversy here except as to the payment of costs. Under the uniform rulings of this court in cases of this character, the case must be dismissed, and it is so ordered. *Hice v. Orr*, 16 Wash. 163 (47 Pac. 424); *Watson v. Merkle*, 21 Wash. 635 (59 Pac. 484); *State ex rel. Taylor v. Cummings*, 27 Wash. 316 (67 Pac. 565); *Campbell v. Hall*, 28 Wash. 626 (69 Pac. 12).

[No. 4679. Decided July 15, 1903.]

J. E. RAFFERTY, *Respondent*, v. PORTLAND, VANCOUVER
AND YAKIMA RAILWAY COMPANY, *Appellant*.

RAILROADS — KILLING STOCK — EVIDENCE.

In an action for the killing of stock on a railroad right of way through negligence in the operation of the train at a point where stock was frequently encountered and likely to be caught in a trap, the plaintiff is entitled to show lack of cattle guards,

although not alleged, as descriptive of the place, and as bearing upon the degree of care required under the conditions existing at that point.

SAME — NEGLIGENCE — QUESTION FOR JURY.

Where a witness of the plaintiff testifies that a locomotive and train of eleven empty cars, running upon a down grade of one per cent. at the rate of ten or twelve miles an hour, could be stopped within sixty feet, negligence in failing to stop the train is a question for the jury, notwithstanding the testimony of the defendant's employees to the effect that the train was in all respects properly equipped and operated and that it could not have been stopped in any event before reaching the stock on the track about 400 feet away.

SAME.

Where a train consisting of a locomotive and eleven empty cars was running on a down grade of one per cent. at about ten or twelve miles an hour at a point where stock was frequently encountered and likely to be caught in a trap, it is a question for the jury whether defendant was guilty of negligence in running at this place at such a rate of speed that the train could not be controlled.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

W. W. McCredie, E. M. Rands and J. W. Hopkins,
for appellant:

The unsupported testimony of witness Groves to the effect that the train could have been stopped within sixty feet is so unreasonable that no jury would be authorized to accept it as overthrowing the overwhelming testimony to the contrary. *Air-Line Ry. Co. v. Gravitt*, 93 Ga. 369. And refusal to direct a verdict for the defendant is error of law. *Volkman v. Chicago, St. P., M. & O. R. R. Co.*, 37 N. W. 731; *Lomer v. Meeker*, 25 N. Y. 361. The defendant fully discharged its duty. *Barrows, Negligence*, 343.

Where the positive testimony of defendant's employees shows that the injury could not have been avoided, the presumption arising from the killing is rebutted and a verdict against the company is contrary to law. *Western & A. R. R. Co. v. Robinson*, 114 Ga. 159; *Southern Ry. Co. v. Adkins*, 114 Ga. 135; *Railway Co. v. Whayne*, 64 S. W. 506; *Cleveland v. Chicago & N. W. R. R. Co.*, 35 Iowa, 220; *Bemis v. Connecticut, etc., R. R. Co.*, 42 Vt. 375; *Georgia S. & F. Ry. Co. v. Sanders*, 111 Ga. 128.

James P. Stapleton, for respondent.

MOUNT, J.—The plaintiff in this action recovered a judgment against defendant in the court below for the sum of \$200, being the value of two horses killed by defendant on its line of railway. Defendant appeals.

Three errors are alleged, as follows: "(1) Error in overruling the defendant's motion to strike out the answer of the witness Kaufman, wherein he testified that there was no cattle guard at the place where the horses were killed; (2) error in overruling defendant's motion for a directed verdict in its favor; (3) error in overruling the defendant's motion for a new trial." The facts, briefly stated, are as follows: On August 2, 1902, two horses belonging to respondent were killed by appellant's logging train at a place where the right of way was unfenced. This train consisted of an engine, nine empty logging cars, and two empty wood cars. The train was running on a one per cent. down grade, without steam, by gravity, at the rate of about ten or twelve miles per hour. As the train came round a curve, the engineer saw the horses about 250 or 300 feet away on the track. The track was on a grade several feet high. About ninety

feet beyond the horses was a trestle about fifteen feet high. The horses started down the track toward the trestle in front of the train. About the time the horses came to the trestle the train overtook them and killed them both. They were pushed along on the trestle for about 150 feet, when they fell over the side thereof. The train went on. It did not come to a stop. Stock were frequently upon the track at this point. The engineer did all he could to stop the train after seeing the horses, but could not do so with safety to the train in time to prevent a collision. The allegation of negligence in the complaint is: "That the defendant, by its agents, officers, and servants, carelessly and negligently ran down and ran over, with its locomotive and train of cars, and killed, two horses, the property of the plaintiff; . . . that the railroad and right of way of said defendant at the point of killing was unfenced." While the witness Kaufman was on the stand, describing the place and locality where the horses were killed, he testified as follows:

"Q. Are you familiar with the track along this end of the trestle, or near where these horses were struck? A. Been over it lots of times; yes, sir. We moved out about six months ago. Q. Is it fenced along there—the trestle—the railroad on this side of the trestle, this way? A. Yes, sir; fenced on both sides. Q. Fence runs along each side of the railway track this way? A. Not clear out. They come up to the trestle—to the road. Q. The fence runs up to the track from this side? A. Yes, sir; by the road there. Q. Is there a cattle guard at this end? A. Yes, sir; where the fences come together. Q. Is there at the other end of that place? A. No, sir; none there."

Appellant thereupon moved to strike out that part of the evidence relating to cattle guards, because the complaint did not allege any negligence as to cattle guards.

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The motion was denied, we think properly, because the evidence was simply descriptive of the place. The negligence alleged was in the operation of the train. The plaintiff was authorized under that allegation to show the conditions existing at that point. If the point was one where stock was frequently encountered, and where they were likely to be caught in a trap, and the employees knew this fact, much more care was required in the control of the train and rate of speed thereof than at a point not so situated. It was not error to deny the motion.

The other two errors assigned are based upon the same question, and are discussed together. Appellant's witnesses testified, in substance, that the train was running at the usual and ordinary rate of speed; that the train was equipped with the usual and ordinary appliances, and was officered with a proper crew; that the horses suddenly appeared upon the track; that as soon as they were discovered the engineer set the air brake on his engine, reversed his engine, and sounded his warning whistle; that the horses then ran along the track between the rails and out upon the trestle, where the train struck them; and that it was impossible, in any event, to stop the train before it reached the place where the horses were killed. Appellant contends that this evidence was wholly uncontradicted and undisputed, and that therefore it was the duty of the court to dismiss the case. One of plaintiff's witnesses, however, in rebuttal, testified that a train of this kind, running at the rate of ten or twelve miles per hour on a one per cent. down grade, could have been stopped within sixty feet. We think this evidence alone was sufficient to take the case to the jury. Furthermore, it is conceded that stock were frequently encountered at this place. This being true,

it was a question for the jury whether, under the conditions existing there, the company was negligent in running at such a rate of speed that the train could not be controlled, where stock was to be expected and encountered upon its track.

The judgment is affirmed.

FULLEERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4655. Decided July 16, 1903.]

THE STATE OF WASHINGTON *on the Relation of Arthur Evers, Respondent, v. JOHN BYRNE et al., as Commissioners of Thurston County, Appellants.*

MANDAMUS — PARTIES — OFFICIAL CAPACITY.

A petition in which the averments relate to the appellants as county commissioners and the prayer is that, as such, they be required to make a tax levy, sufficiently brings them into court in their representative and not in their individual capacity.

SAME — EMERGENCY FOR ALTERNATIVE WRIT.

In an application for an alternative writ of mandamus to the county commissioners to levy a tax, sufficient emergency is shown by the fact that the tax levy must be decided at the session then being held and within one week; and the relator was not required to show why he did not make application sooner.

SAME — DEMAND.

Where the county commissioners are required by law to levy a tax to meet a certain charge, and have actual knowledge of the law, and admit knowledge of the essential facts, and deny that they are required to make the levy, and it is apparent from their course that a demand would have been useless, no demand is necessary prior to the issuance of an alternative writ, although the levy may serve a private interest.

TAXATION — SCHOOL LEVY — STATUTES — REPEAL.

Laws of 1889-90, p. 48, § 5, providing that school directors must ascertain and levy annually the tax necessary to pay inter-

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est on bonds issued under authority thereof, was repealed by Laws 1897, p. 356, which provides (p. 393, § 97) that the directors shall annually ascertain the necessary amount, and report the same to the county commissioners, and that the latter shall make the levy; and this changes the method of tax levies in the case of outstanding bonds issued under the earlier act, in the absence of the impairment of any contractual right.

SAME.

It is competent for the legislature to provide that the amount of a school tax shall be determined by the school board, and to require that the ministerial act of making the levy be performed by the board of county commissioners.

MANDAMUS — INTEREST ON BONDS.

Where the school directors annually certify the amount necessary to pay interest upon school bonds, and the county commissioners neglect and refuse to make the required levy, mandamus will issue, on the application of the holder of part of the bonds, requiring the levy to be made.

MANDAMUS — DOUBTFUL CASE.

Where the intent of the law is clear, it can not be said that there is such doubt as to prevent the issuance of a writ of mandamus.

TAXATION — INTEREST OF BONDHOLDER.

It cannot be objected that the relator, asking for a tax levy to meet interest on bonds, is the holder of only one series of the bonds, as he could not ask for a levy in his own behalf only, thereby gaining a preference.

SAME — LEVY AFTER TAX ROLLS ARE COMPLETED.

It cannot be objected to the issuance of a writ of mandamus requiring a tax levy that the tax rolls are already completed and partly collected, and that it will be an inconvenience to levy and collect the amount wrongfully omitted from the rolls in the first instance.

SAME — DISCRETION IN DISTRIBUTING THE TAX.

Where the lower court has ordered a tax levy to meet interest on bonds that has accumulated for several years owing to the failure of the proper officers to levy the tax, it cannot be said that there was abuse of discretion in not distributing the tax over a number of years.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

George H. Funk, Prosecuting Attorney, and *Vance & Mitchell*, for appellants:

Where the duty is one affecting a private interest demand is necessary before mandamus can be maintained. 13 Enc. Pl. & Pr. p. 619; Spelling, Injunction, etc. § 1381; Wood, Extraordinary Remedies, 93; *Board of Commissioners v. People*, 46 Pac. 107; *Ingerman v. State*, 128 Ind. 226; *People v. Mt. Morris*, 137 Ill. 576; *People v. Board of Education*, 127 Ill. 613; *Macoupin County v. People*, 58 Ill. 195; *Lake County Com'rs v. State*, 24 Fla. 277; *Howard v. Huron*, 26 L. R. A. 493; *State ex rel. Magie v. Township of Union*, 42 N. J. Law, 531; *Attorney General v. Boston*, 123 Mass. 460; 2 Dillon, Municipal Corporations, 866-7 and notes.

Peters & Powell and *Burke*, *Shepard & McGilvra*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—A petition was filed in the superior court by relator, the respondent here, asking the issuance of a writ of mandate directed to the appellants, requiring them as county commissioners, to make the necessary levy to provide for the payment of accrued interest upon certain outstanding bonds issued by School District No. 1 in Thurston county. It appears from the petition that on July 1, 1890, said district regularly issued and sold a series of bonds in the sum of \$59,000, payable twenty years after date, and bearing interest at the rate of six per cent. per annum, payable semi-annually; that on the first day of June, 1893, the said district, for the

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purpose of constructing what is known as the "West Side School Building" therein, regularly issued and sold bonds in the sum of \$15,000, also payable twenty years after date, with interest at six per cent. per annum, payable semi-annually. It is also alleged that the petitioner is the owner of the last named series of bonds and the interest coupons thereof; that the petitioner does not know who is the owner of the first mentioned series of bonds, but that the two series named represent all of the outstanding bonded indebtedness against said school district. It is averred that no interest has been paid on the first mentioned series of bonds which has matured since January, 1900, and that no interest payment upon the later series have been made since the payments which matured in June, 1900, although demand has been regularly made for the same at the place and times of payment; that the board of directors of said school district have at all times since the issuance of both of said series of bonds recognized the validity of the same, and that at a meeting of said board next preceding the October session of the county commissioners of said Thurston county, the said school directors have regularly, during the years 1899, 1900, 1901 and 1902, certified to said county commissioners, in the manner required by law, the amount of interest outstanding on all of said bonds, requiring said commissioners to levy a sufficient tax to cover said interest; that said commissioners have at all times failed and refused to make any levy to provide for said interest, and there has been no money in any fund applicable to the payment thereof. The amount of outstanding due and unpaid interest upon all of said bonds, including interest on overdue coupons, is alleged to be \$18,561; and it is further alleged that the petitioner's agent, who

verified the petition, and who acted in behalf of petitioner, has requested one of the board of county commissioners—and the only one accessible to said agent—that he and his co-commissioners, at their next meeting for the purpose of levying the general taxes, shall levy a tax to pay said interest, but the said commissioner has informed said agent that the said board of county commissioners has for the years aforesaid refused to make any levy to meet said interest, for the reason that they believed that the interest is payable out of the general school fund, and that they as county commissioners are not authorized or required by law to make a special levy for the purpose. This established course of the county commissioners, and the further fact that, unless restrained, they will complete the tax levy of 1902 by omitting any special levy for this interest, are alleged as grounds for speedy relief by way of an alternative writ of mandate, and also for a restraining order preventing such levy from being completed with such omission pending the hearing on a return to the alternative writ. The alternative writ was issued, and appellants first moved to quash the same and dismiss the proceeding, on the ground that the facts stated in the petition are insufficient to support the writ. The motion was denied. Thereupon appellants demurred to the petition upon the same ground and upon the further ground that the court has no jurisdiction of the subject-matter. The demurrer was also overruled. Appellants then made return to the alternative writ, substantially admitting the material facts set out above, but denying that any demand was ever made upon them as a board of county commissioners to make the levy mentioned, and also denying that it is their duty, or that they have the power,

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to lawfully make the same. The return also contains certain affirmative matter to the effect that appellants did not believe, prior to the issuance of the alternative writ, that it was their duty to make such levy; also certain averments relative to the financial condition of the school district. A demurrer to the affirmative matter contained in the return was sustained, and thereupon the court heard proofs, and found that the material allegations of the petition and alternative writ were thereby sustained. Judgment was entered directing the issuance of a peremptory writ of mandate requiring the appellants, as county commissioners, to include in their general levy of taxes for 1902 a levy on the property of said school district of a tax sufficient to pay the amount of interest above mentioned. This appeal is from said judgment.

It is first urged in support of the motion to quash the alternative writ that the petition upon which the writ was based does not allege anything as to the official and representative character of appellants, and that they were brought into court by means of the alternative writ as individuals, and not as county commissioners; also that the petition was filed and the alternative writ was issued on the same day appointed by law for the meeting of the county commissioners, at which meeting the levy for the ensuing year was required to be determined. It is contended that, since the only emergency shown by the petition was the fact that, if the alternative writ did not issue, the appellants would proceed to make the levy, omitting therefrom the special levy desired, there was no proper excuse for failing to make the application in time to have given notice of the hearing prior to the issuance of the writ. Referring to the first point sug-

gested, we think it sufficiently appeared from the context of the petition that the respondent sought to bring the appellants into court in their representative, and not in their individual capacity. Every averment connecting appellants with the subject matter related to them as county commissioners, and not as individuals, and the prayer of the petition asked that the writ should issue requiring them, as county commissioners, to make the levy. In relation to the second contention above mentioned, we think sufficient emergency appeared upon the face of the petition to warrant the issuance of the alternative writ. The law required the levy to be completed at that session of the commissioners, and within about a week, and, with the past and threatened course of appellants in the premises as set forth, the necessity for prompt action sufficiently appeared. It is true no allegations were made to show that the application could not have been made sooner, but we think such allegations were unnecessary. Appellants had just assembled, or were about to do so, in a public capacity. While so assembled, the law imposed upon them a duty in the premises, either to do or decline to do that which respondent sought. We know of no legal requirement that respondent should have sooner made his application, and we see no impropriety in his making it at the time appellants were assembled when they would consider the tax levies for the year, and which involved the actual subject-matter of his petition. No error was therefore committed in denying the motion to quash on the grounds urged.

It is next insisted that the alternative writ was wrongfully issued, because no demand was made prior to the application. The only allegations bearing upon that subject relate to an interview with one member of the board.

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This was in the nature of a private conversation, and cannot be said to have amounted to a demand at least of the board of county commissioners. It is, therefore, necessary to determine if a demand was required in this case. This subject is involved in conflict of authority. We are first referred by appellants to High's Extraordinary Legal Remedies (3d ed.), § 41, where the following statement is found:

"And it is held, where the person aggrieved has a private interest in or claims the immediate benefit of the act sought to be coerced, that he must first make a demand upon the officer to lay the foundation for relief by mandamus."

It is argued by appellants that the relator (respondent here) has a private interest to be served by this proceeding, and that the case therefore falls within the above rule. In examining the cases cited to support the above stated rule, we find *Commonwealth v. Commissioners*, 37 Pa. St. 237. There it was sought by the relator, as the court states it, "to compel the commissioners to assess and collect a tax, as by law they are required to do, that the treasury of the county may be placed in a condition to pay the interest on a loan, part of which he holds." It was held that it was not necessary for the relator to precede his application for mandamus with a request or demand. In that connection the court observes as follows, at page 246:

"If the commissioners may neglect this duty until somebody interested requests them to perform it, we know of no duty of their office which they may not in like manner neglect. And if *they* may wait for individual requests and demands before going forward in a plainly marked path, other public officers may likewise halt in the way prescribed for them to walk in, and the end will be that laws will become ropes of sand, and govern-

ment an unsubstantial dream. The duty of the commissioners was plain and imperative before any *mandamus* issued."

The above case seems to involve the precise principle raised by the petition in the case at bar. Mr. High, in the same section, announces the rule that a demand is unnecessary where the duty of the officer is of a strictly public nature, and where no individual interests are affected. It is not made very clear just what are the duties "of a strictly public nature," as distinguished from those where individual interests are affected. The classification made by the author is at most difficult to apply in all cases. Such difficulty is apparent from the fact that the case of *Commonwealth v. Commissioners, supra*, is cited in support of the last stated rule as to classification. Thus, apparent assent is given to the doctrine of that case as involving a public duty which is broader than the mere service of a private interest. Possibly, the author may have entertained the view that duties pertaining to the levy and collection of public taxes, as provided by law, are strictly public in their nature, although they may incidentally serve a private interest. That it may have been his view that the duty to make such a tax levy as is here sought is not subject to the rule requiring a demand is emphasized by a further statement, found in § 377b of the same work, as follows:

"When the duty of municipal officers to levy and collect a tax for the payment of a judgment against a corporation is plain and imperative, it affords no excuse for their inaction that a demand was not made upon them for the performance of this duty before seeking the extraordinary aid of the courts. The relief will therefore be granted in such case, although no previous demand was made upon the officers to levy the tax."

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In support of the above we find cited *State ex rel. Farr v. City Council of Racine*, 22 Wis. 258, and *Fisher v. Charleston*, 17 W. Va. 595. We have examined these cases and find them directly in point. In the last-named case the court, after reviewing numerous conflicting authorities, adopts the rule laid down in *Mottu v. Primrose*, 23 Md. 482, 501, which is stated as follows:

"The writ not being *ex debito*, but in all cases resting in the sound discretion of the court, there may be some cases in which the court, in the exercise of its discretion, would refuse the writ where no previous demand and refusal had been made; as where the claim of the petitioner, or the duty to be performed, is uncertain or not clearly known to the respondent. Such, however, is not the case here, . . . and to require of the petitioner a previous demand upon them to discharge their duty, would have been to require a useless and nugatory act."

This rule seems peculiarly applicable in the case at bar. The appellants were chargeable with knowledge of the law relating to their public duties, and that they had actual knowledge of the provisions of law in the premises, and of the desire that they should make the levy is not disputed. In the return to the alternative writ appellants admit knowledge of the essential facts, but simply deny that they are required to make the levy. It is thus apparent from their course, both prior and subsequent to the issuance of the alternative writ, that a demand would have been a useless thing. In *Attorney General v. Boston*, 123 Mass. 460, 477, it was observed as follows:

"But where a municipal corporation or board has distinctly manifested its intention not to perform a definite public duty, clearly required of it by law, no demand is necessary before applying for the writ."

In view of the authorities we have discussed, and also of the circumstances of this case, it is held here that no demand was necessary prior to the issuance of the alternative writ, if the law imposed upon appellants the duty to make the tax levy sought. That subject will be hereinafter discussed.

Did the law require appellants to make this levy? These bonds were issued under authority of the act of 1890. Session Laws 1889-90, p. 45. Section 5 of that act provides that "the school directors of said district must ascertain and levy annually the tax necessary to pay the interest upon such bonds as it becomes due." This act was carried forward into Hill's Code, Vol. 1, title 50, ch. 4. By an act of the legislature, as found in chapter 118, p. 356, of the Session Laws of 1897, the provisions of the said act of 1890 were expressly repealed. The act of 1897 purported to cover the entire law relating to the system of public schools in this state. The act declares that it "shall be known and cited as the Code of Public Instruction of the State of Washington." By the repeal of the act of 1890, the provision above quoted requiring the directors of school districts to ascertain and annually levy the tax necessary to pay interest upon school bonds as it becomes due was also repealed. The procedure in that particular was changed by § 97 of the act of 1897, which provides that the directors shall still annually ascertain the necessary amount, but, instead of making the levy of the tax themselves, they are required to annually report the amount to the board of county commissioners, and the latter are required to make the levy for its collection as in the case of other taxes. The duty of the county commissioners to levy the tax when it has been returned and certified to them by the school

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directors seems to be clear. The petition and record here show that the directors of school district No. 1 of Thurston county annually certified the amount required to pay interest upon these bonds, but appellants neglected and declined to make the required levy. It is contended that the act of 1897 is independent, and not amendatory, in its nature, and that it was, therefore, not intended to change the method of tax levies in the cases of then outstanding bonds unless school districts and bondholders should agree to call in outstanding bonds, and issue in lieu thereof new bonds under the later act. We think it was the intention that the new act should supplant the old one as to the method of procedure, and that method must be followed in all cases, unless it shall have the effect to impair some contractual right, which is not the case here.

It is further urged by appellants that it is not competent for the legislature to provide that one municipal corporation shall exercise the taxing functions of another, and that, if respondent's position here is correct, then the school district is no longer authorized, through its executive body, to determine and levy taxes necessary for the payment of its debts and maintenance. The law does, however, provide that both the power and duty of determining the amount rests with the officers of the school district, but the mere ministerial duty of making a levy therefor devolves upon another. It thus appears that none of the essential functions of local control relating to the amount of the tax that shall be imposed are in any degree affected by the law. No authorities are cited upon this point. The method provided has, no doubt, been pursued by the school districts of this state for the past six years, and, in the absence of an

it was a question for the jury whether, under the conditions existing there, the company was negligent in running at such a rate of speed that the train could not be controlled, where stock was to be expected and encountered upon its track.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4655. Decided July 16, 1903.]

THE STATE OF WASHINGTON *on the Relation of Arthur Evers, Respondent, v. JOHN BYRNE et al., as Commissioners of Thurston County, Appellants.*

MANDAMUS — PARTIES — OFFICIAL CAPACITY.

A petition in which the averments relate to the appellants as county commissioners and the prayer is that, as such, they be required to make a tax levy, sufficiently brings them into court in their representative and not in their individual capacity.

SAME — EMERGENCY FOR ALTERNATIVE WRIT.

In an application for an alternative writ of mandamus to the county commissioners to levy a tax, sufficient emergency is shown by the fact that the tax levy must be decided at the session then being held and within one week; and the relator was not required to show why he did not make application sooner.

SAME — DEMAND.

Where the county commissioners are required by law to levy a tax to meet a certain charge, and have actual knowledge of the law, and admit knowledge of the essential facts, and deny that they are required to make the levy, and it is apparent from their course that a demand would have been useless, no demand is necessary prior to the issuance of an alternative writ, although the levy may serve a private interest.

TAXATION — SCHOOL LEVY — STATUTES — REPEAL.

Laws of 1889-90, p. 48, § 5, providing that school directors must ascertain and levy annually the tax necessary to pay inter-

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est on bonds issued under authority thereof, was repealed by Laws 1897, p. 356, which provides (p. 393, § 97) that the directors shall annually ascertain the necessary amount, and report the same to the county commissioners, and that the latter shall make the levy; and this changes the method of tax levies in the case of outstanding bonds issued under the earlier act, in the absence of the impairment of any contractual right.

SAME.

It is competent for the legislature to provide that the amount of a school tax shall be determined by the school board, and to require that the ministerial act of making the levy be performed by the board of county commissioners.

MANDAMUS — INTEREST ON BONDS.

Where the school directors annually certify the amount necessary to pay interest upon school bonds, and the county commissioners neglect and refuse to make the required levy, mandamus will issue, on the application of the holder of part of the bonds, requiring the levy to be made.

MANDAMUS — DOUBTFUL CASE.

Where the intent of the law is clear, it can not be said that there is such doubt as to prevent the issuance of a writ of mandamus.

TAXATION — INTEREST OF BONDHOLDER.

It cannot be objected that the relator, asking for a tax levy to meet interest on bonds, is the holder of only one series of the bonds, as he could not ask for a levy in his own behalf only, thereby gaining a preference.

SAME — LEVY AFTER TAX ROLLS ARE COMPLETED.

It cannot be objected to the issuance of a writ of mandamus requiring a tax levy that the tax rolls are already completed and partly collected, and that it will be an inconvenience to levy and collect the amount wrongfully omitted from the rolls in the first instance.

SAME — DISCRETION IN DISTRIBUTING THE TAX.

Where the lower court has ordered a tax levy to meet interest on bonds that has accumulated for several years owing to the failure of the proper officers to levy the tax, it cannot be said that there was abuse of discretion in not distributing the tax over a number of years.

paid. Respondent had the clear right to have this tax levied regularly with the 1902 tax levy, and no additional burden is imposed upon the taxpayers that did not exist at that time. Relating to any inconvenience or claim of confusion in the premises, it may be said that in *State ex rel. Ross v. Headlee*, 22 Wash. 126 (60 Pac. 126), this court affirmed a judgment which directed the issuance of a writ of mandate against the auditor of Snohomish county, requiring him to revise the tax rolls and extend the taxes in accordance with a reduced levy made by the county commissioners. The revision related to the levy of October, 1899. The case was decided here January 29, 1900, and did not become final until thirty days thereafter. The tax had become payable before this court's judgment had become final, and possibly some persons had paid their taxes meanwhile. Again, in *State Savings Bank v. Davis*, 22 Wash. 406 (61 Pac. 43), this court decided, on April 26, 1900, that a judgment authorizing a writ of mandate requiring the commissioners of Jefferson county to levy the maximum rate for the year 1898 should be affirmed. It will be observed that the whole year of 1899 succeeding the year when the levy should have been made had expired before the decision of this court was rendered.

It is last urged that it was within the discretion of the lower court to have directed the distribution of this delinquent tax over a number of years, and thus relieve in some measure the burden of the additional tax. We are asked to modify the judgment to that extent. It is not necessary that we shall examine the question as to what extent the lower court had discretion in the premises. If he had such discretion, we do not think we should review it here to the extent of saying that it was

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abused. Respondent's rights are to be regarded here equally with those of the taxpayer. The school district has enjoyed the benefits accruing from the use of the respondent's loan, and for years he has received no interest when he was entitled to it, as the contract and law provide. The officers of the school district have discharged their duty, but up to this time it has not been productive of results in behalf of the creditors of the district. We see no reason in conscience why they should be longer postponed in the enforcement of their rights.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4668. Decided July 16, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. MACK
SCOTT, *Appellant*.

STATUTES — AMENDMENT — TITLE.

LAWS of 1897, p. 19, entitled "An act amending section 28 of the Penal Code of the State of Washington relating to the crime of rape," setting forth in full the section as amended does not violate art. 2, § 37, of the constitution providing that no act shall be amended by mere reference to its title, but that the revised act shall be set forth in full; and it is not necessary to refer in its title to the title of the act amended.

SAME.

Such act is not unconstitutional as failing to express the subject of the act in the title, as the subject is sufficiently expressed either as an amendatory act or as an independent act, treating the references to existing statutes as surplusage.

Appeal from Superior Court, King County. Hon.
ARTHUR E. GRIFFIN, Judge. Affirmed.

W. H. Morris, Frank S. Southard, Andrew R. Black, John E. Humphries and Harrison Bostwick, for appellant:

In order to amend a statute it is necessary to refer to the title of the original act amended. *O'Mara v. Wabash R. R. Co.*, 150 Ind. 648 (50 N. E. 821); *Boring v. State*, 141 Ind. 640; *Feibleman v. State*, 98 Ind. 516; *State v. Halbert*, 14 Wash. 306; *Harland v. Territory*, 3 Wash. T. 142; *Copland v. Pirie*, 26 Wash. 481; *State ex rel Seattle Electric Co. v. Superior Court*, 28 Wash. 317; *Lewis v. Dunne*, 134 Cal. 291 (55 L. R. A. 833); *State v. Jaunt*, 13 Ore. 115; *Gunter v. Texas Land & Mortgage Co.*, 82 Tex. 496; *Webster v. Powell*, 18 South. 441.

W. T. Scott, Walter S. Fulton, Vince H. Faben, J. E. Hawkins and Elmer E. Todd, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant was convicted of the crime of rape, and appeals from the judgment and sentence pronounced against him. The act (Laws 1897, p. 19) under which he was convicted reads as follows:

“An Act amending section 28 of the Penal Code of the State of Washington, relating to the crime of rape.

“Be it enacted by the Legislature of the State of Washington:

“Section 1. That section 28 of the Penal Code of the State of Washington, relating to the crime of rape, be amended to read as follows: Sec. 28. A person shall be deemed guilty of rape who: 1. Shall, by force and against her will, ravish and carnally know any female of the age of eighteen years or more; 2. Shall, by deceit, deception, imposition or fraud induce a female to submit to sexual intercourse; 3. Shall carnally know any female child under the age of eighteen years.

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"Sec. 2. Any person convicted of the crime of rape, as defined by section one of this act, shall be punished by imprisonment in the penitentiary for life or any term of years."

The only question urged by the appellant is the constitutionality of the above act. He insists that under art. 2, §37, of the constitution, which provides that no act shall ever be revised or amended by mere reference to its title, but that the revised act or section amended shall be set forth at full length, two things are necessary to the validity of an amendatory act: (1) The title of the act to be amended should be referred to by setting the same out in the title to the amendatory act; and (2) the section as amended should be set forth at full length. Cases from the supreme court of Indiana, which will be found collected in *Mankin v. Pennsylvania Co.*, 67 N. E. 229, and the cases of *Copland v. Pirie*, 26 Wash. 481 (67 Pac. 227, 90 Am. St. Rep. 769), and *State ex rel. Seattle Electric Co. v. Superior Court*, 28 Wash. 317 (68 Pac. 957), from this court are cited as maintaining the contention. The cases from Indiana seem to support it; those from this court, however, do not. The statute in question in *Copland v. Pirie* was held unconstitutional because it did not set forth at full length the section of the statute it purported to amend, and was not so complete in itself as to be treated as an independent act. In other words, the legislature sought by that enactment to ingraft into an existing section of the statute an additional provision which altered the scope and effect of the original section, without setting out the section as it would read when amended, rendering it necessary to read both the original and amendatory act to ascertain the legislative will on the particular subject, and it was held that this was violative of the purpose of the constitutional provision. The act in the

second case cited was held invalid because its object was not expressed in its title; that is, it was held that a mere reference to the number of the section sought to be amended was insufficient to comply with the section of the constitution which provides that, "No bill shall embrace more than one subject and that shall be expressed in the title." The principles announced in these cases are clearly different from the principle contended for in the case before us. Here the act objected to does set forth in full the amended section, and the title contains something more than a mere reference to the section number of the section it purports to amend; it goes further and expresses the subject of the section it amends. If, therefore, it is unconstitutional, it is because it does not in its title refer to the title of the act sought to be amended by setting the same out. But we cannot think this necessary to the validity of an amendatory act. The constitutional requirement is only that the subject of the act be expressed in its title. This is the rule for all acts,—those amendatory of existing laws as well as those so far complete in themselves as to be independent acts. No particular formula or particular set of words is prescribed by the constitution to express the subject of an act. It must be, then, that any form of words which will express the subject is a compliance with the constitution. There can be, therefore, no constitutional reason for setting out in the title of the amendatory act the title of the act amended, unless the subject of the act can be expressed in no other form of words. But this is not the case here. The title, "An act amending section 28 of the Penal Code of the State of Washington, relating to the crime of rape", just as clearly expresses the subject of an act relating to that crime as any other form of words could possibly do; and, as it is the subject of the amendatory act that must

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be expressed in its title, we can see no reason why it is not a sufficient compliance with the constitution. But if the act in question is insufficient as an amendatory act, it is sufficient as an independent act. Clearly, the legislature may, under the title "An act relating to the crime of rape," constitutionally define what shall constitute the crime of rape, and provide a penalty for its violation. Such an act, though it might operate to change or supersede existing laws, would not be repugnant to any constitutional provision. And in this case, if the court could not treat the act as amendatory of an existing statute because of the indefiniteness of the reference in its title to existing statutes, it would treat such reference as mere surplusage, and allow the act to stand as an independent act, as if enacted under the title above quoted.

While the precise objection made to this act has not heretofore been passed upon by this court, acts with titles similar to the one to the act in question have been repeatedly sustained by it. Perhaps the most noted case is that of *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520). It was there held that the title, "An act relating to pleadings in civil actions, and amending sections 76, 77, and 109 of the Code of Washington of 1881," sufficiently stated the subject of the act, and was valid. True the court went further, and held in that case that the Code of 1881 could be constitutionally amended by a mere reference to its section numbers, which holding has not been followed in some subsequent cases; but the main point decided has never been questioned, and was affirmed in the recent case of *State ex rel. v. Superior Court*, *supra*. We conclude, therefore, that the title of the act violates no provision of the constitution, and is sufficient. The judgment appealed from is affirmed.

MOUNT, ANDERS, HADLEY and DUNBAR, JJ., concur.

[No. 4600. Decided July 17, 1903.]

WM. CARLISLE *et al.*, *Appellants*, v. CHEHALIS COUNTY,
Respondent.

TAXATION — ARBITRARY ASSESSMENT — EVIDENCE.

In an action to recover taxes paid under protest, and alleged to have been fraudulently and arbitrarily assessed without regard to the true value of the land, it is proper to exclude oral evidence that the assessor increased the assessment of prior years, as the same was not the best evidence and was immaterial.

SAME.

In such action it is proper to receive in evidence on the part of the defendant, as bearing on the good faith of the assessor, and the arbitrariness of his action, (1) letters from the owners and his agent which were in reply to inquiries by the assessor as to their estimate of values; (2) testimony as to the methods pursued by and the duties of his deputy; (3) a certified copy of a deed just prior to the assessment showing a consideration in excess of the valuation; and (4) evidence that, upon objecting before the board of equalization, the owner's agent stated orally that he "had no kick coming."

SAME — APPEAL — REVIEW OF FINDINGS.

In such action findings will not be disturbed where the evidence shows that the assessor made reasonable effort to ascertain the value and exercised his best judgment in fixing the same.

Appeal from Superior Court, Chehalis County.—HON. MASON IRWIN, Judge. Affirmed.

Sidney Moor Heath, for appellants.

J. A. Hutcheson, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellants brought this action to recover from the respondent, Chehalis county, the sum of \$431.10, which was by them paid as taxes to said county. They

are the owners of extensive tracts of land in that county, chiefly valuable for the timber thereon. The total tax upon said lands under the assessment for the year 1900 was \$1,613.85. Taking into account the lawful rebate for prompt payment, appellants tendered as full payment of said taxes the sum of \$1,192.05, which tender was refused. They then paid under protest the whole sum demanded by the county, which they claim is in excess of the amount they should pay in the said sum of \$431.10. They allege that the assessor of the county intentionally, fraudulently, and without regard to the actual value of the lands in comparison with other lands in the vicinity thereof, over-valued the same. They appeared before the board of equalization with this objection, but after a hearing no change was made by that body, and the tax was levied and extended as originally assessed. The county denied their allegations with regard to fraudulent, excessive, and unequal valuations. The cause was tried by the court without a jury, and the court found that the assessor made diligent effort to arrive at the true cash value of the lands, and thereafter, in the exercise of his best judgment, assessed the same at the values set out upon the assessment roll; that the values so placed upon the several tracts were not above the true cash value thereof, and were not in excess of the values placed upon similar lands throughout said county for said year. Judgment was entered denying the prayer of the complaint, and taxing costs to the appellants. They have appealed from the judgment.

Six alleged and separately stated errors relate to the refusal of the court to permit a witness who was the agent of appellants to testify orally as to whether the assessor did increase the valuations placed upon appellants' lands

and adjacent lands for the year 1900 above the valuations placed upon them for 1899. We see no error in this. The assessment rolls for these years were public records, and were the best evidence of the facts sought to be shown. Moreover, we think the questions were objectionable as being immaterial. It was the duty of the assessor to place cash values upon the lands, without regard to the valuations of former assessments.

Error is claimed upon the admission of a letter from the president of the company that owned the lands on the 1st day of March, 1900. Appellants purchased them subsequent to that date. The letter related to the then owners' estimate of the amount of timber upon the lands, and therefore bore upon the question of their value. Respondent does not claim that the letter was conclusive against these appellants as to the value, and it was not introduced for that purpose, but for the purpose of showing that the assessor was making an earnest effort to arrive at the true value, in that he had previously written the owner upon the subject, and to his inquiry the owner had replied giving its own estimates as to values. The evidence was proper upon that theory, in view of the fact that the assessor was charged with having acted in an arbitrary manner in making the assessment. It is true, the letter of the assessor to which the owner's letter was a reply was not introduced in evidence; but the owner's letter showed clearly upon its face that it was a reply to the assessor's inquiry concerning the probable amount of timber upon the lands, and the fact that it was a reply to such a communication from the assessor is not disputed. We think the letter was not incompetent for the purpose claimed by respondent, although the assessor's letter which called it forth was not introduced. A similar objection was made to a letter from appellant's agent in which he stated the ap-

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proximate cost of a cruise necessary to arrive at the probable amount of timber. This letter was introduced for the same purpose as the other, and was for that reason not objectionable.

Complaint is made that the assessor was permitted to testify as to the duties of his deputy, and the manner in which he made up his reports. The witness was attempting to explain the manner in which the field book then before the court was made up. These officers were charged with arbitrary and fraudulent action, and it was material to show the method they pursued. The testimony of the witness was to the effect that he and his deputy went over the field data together, considering such information as they could obtain, and making changes in the field notes as they deemed necessary, in accordance with such information. This was not improper as refuting the charge of arbitrary action, and, as it appeared that the conference between the witness and his deputy and much of the information they received was oral, the evidence was proper for the purpose stated.

A certified copy of the deed by which appellants became the owners of the lands was introduced in evidence. This deed bears the date of March 13, 1900, and was acknowledged the following day. The stated consideration is \$80,000. It will be observed that the assessor's valuation of these lands was fixed as of March 1, 1900. Respondent does not claim that the consideration mentioned in the deed is necessarily the actual cash value of the land, but that it is one of the indications of value which the assessor may consider. Appellants did not claim or attempt to show that they paid a less sum for the lands than the amount mentioned in the deed, and if they paid that sum, the assessor can scarcely be said to have acted in an arbi-

trary manner when he placed a much less valuation upon the same lands as of a date only twelve or fourteen days prior to appellants' purchase. We think the deed was not prejudicially admitted for the purpose of showing that the assessor did not act arbitrarily or fraudulently. If appellants desired to make any explanation as to the relation the amount of the stated consideration bore to the actual value, they doubtless would have been permitted to do so if they had asked it.

Objections were made to certain evidence as to what appellants' agent said before the board of equalization. It is true, appellants' objection to the assessment and also the final action of the board were in writing; but, as bearing upon the question that neither the assessor nor the board acted arbitrarily, we think it was not improper to show what took place before the board, and what consideration was given the subject as leading up to their final action embodied in the record. The testimony objected to was to the effect that, when the board were considering appellants' objections to the assessment, their agent stated, in substance, that he had "no kick coming." The evidence was not improper for the purpose stated. Appellants' agent says that, if he made such a remark, it was intended as a joke, and that appellants' actual views were seriously embodied in their written objections. The weight to be attached to the statement, and the extent to which the board of equalization might have reasonably considered it, were properly for the consideration of the trial court.

Further errors assigned are based upon the findings of the court. We have examined the evidence, and believe the findings are fully sustained thereby. It is not even claimed here that these lands were excessively valued, but that there was not a proper equalization of relative values.

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Appellants insist, in their argument, that the valuations upon their property were raised above former assessments by some fixed ratio, without regard to actual value, and that other property was not so raised. We think this contention is not supported by the evidence. On the other hand it does appear that some other similar lands in the same locality were assessed at a higher average value than those of the appellants. The evidence also satisfactorily shows that the assessor made reasonable effort to ascertain the true cash values, and that he exercised his best judgment in fixing the same. No fraudulent, arbitrary, or capricious action of the assessor is shown, and, within the rule of *Templeton v. Pierce County*, 25 Wash. 377 (65 Pac. 533), appellants are not entitled to the relief which they seek.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4498. Decided July 20, 1903.]

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640 482

THE STATE OF WASHINGTON, *Respondent*, v. P. DURBIN, *Appellant*.

CRIMINAL LAW — DISMISSAL — BAR TO ANOTHER PROSECUTION.

Under Bal. Code, § 6916, providing that an order of dismissal is a bar in the case of a misdemeanor, but that it is not a bar if the offense charged be a felony, the voluntary dismissal of an information for assault and battery is a complete bar to a conviction for assault and battery, under a subsequent information charging the same facts as constituting the crime of attempting to commit mayhem. (Dunbar dissents.)

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Martin & Grant, for appellant.

N. T. Caton, Prosecuting Attorney, and *Myers & Warren*, for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—On August 9, 1901, the prosecuting attorney of Lincoln county filed an information against the appellant, charging him with assault and battery committed on the person of one Thomas Amery. A warrant was issued thereon, and the appellant arrested, and placed under bonds to answer the charge at the next jury term of the superior court. On October 2, 1901, the prosecuting attorney filed another information against the appellant, reciting the same acts on which the charge of assault and battery was founded, and charging him with the crime of attempting to commit mayhem. A warrant was issued on this information, and the defendant again arrested, and placed under bonds. On October 25th, thereafter, the prosecuting attorney moved a dismissal of the charge of assault and battery, and the same was granted by the court on the ground, as recited in the order, "that another charge is placed against the defendant." Afterwards, when the appellant was required to plead to the information charging him with attempt to commit mayhem, he entered a plea of a former acquittal of the offense charged, and on the trial introduced the record showing the filing of the information against him for assault and battery, his arrest thereunder, and the subsequent dismissal of the action, and requested an instruction of acquittal. The court refused to give the requested instruction, and charged the jury, in effect, that the dismissal of the action for assault and battery did not constitute a bar to the prosecution for the charge of felony; charging them fur-

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ther that they could find the appellant guilty of assault and battery in case they should fail to find that the higher crime was made out. The jury returned a verdict of assault and battery, on which the judgment and sentence appealed from was pronounced.

Of the errors assigned the only one we have found it necessary to notice is the ruling of the court holding that the dismissal of the action of assault and battery did not constitute a bar to another prosecution for the same offense. In this we think the trial court was in error. By §6914 of the Code (Ballinger's) the court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order an action, after an indictment or information, to be dismissed; but must set forth in the order of dismissal, the reason for the same, which must be entered upon the record. By §6915, the entry of a *nolle prosequi* is abolished, and no prosecuting attorney is permitted to discontinue or abandon a prosecution except as provided in the preceding section cited. By §6916, it is provided that "An order for dismissal as provided in this chapter is a bar to another prosecution for the same offense, if it be a misdemeanor; but it is not a bar if the offense charged be a felony." It is manifest that the statute meant to make the dismissal of a prosecution for a misdemeanor after an indictment had been returned or an information filed equivalent, in so far as a bar to another prosecution was concerned, to a trial on the merits and a verdict and judgment of conviction or acquittal. We cannot understand how any other meaning can be given to the language of the statute. A dismissal under such circumstances is a bar to a subsequent prosecution for the same offense, and a judgment of conviction or acquittal after a trial

upon the merits is not more. As the case stood at the time of the trial, therefore, the appellant was being tried for an offense, after he had been acquitted for a minor offense included within that offense, and the pertinent question is, will an acquittal for a minor offense included in a greater bar a prosecution for the greater? The question is not answered alike in all jurisdictions, but it seems to us that the weight of authority, as well as the better reason, are with the rule that it is such a bar. The cases on the question will be found collected in 17 Am. & Eng. Enc. Law, pp. 599-601, wherein will be found also the rules and the reasons given therefor.

There is nothing in the case of *State v. Armstrong*, 29 Wash. 57 (69 Pac. 392), or *State v. Lewis*, 31 Wash. 75 (71 Pac. 778), which is contrary to the position we have taken in this case. In those cases the prosecutions dismissed were charges of felony, and the statute expressly provides that, if the offense charged be a felony, its dismissal is not a bar to another prosecution for the same offense. The distinction may not be founded on any sound reason, but this is not a sufficient cause for ignoring the statute. The law is of the legislature's making, not the court's, and the court can do nothing less than give it force when its meaning is once ascertained.

The judgment appealed from is reversed, and the cause remanded with instructions to discharge the appellant.

HADLEY and MOUNT, JJ., concur.

DUNBAR, J. (dissenting)—I dissent. I think the statute simply intended to announce the plain proposition that an order for dismissal bars another prosecution for the same offense in cases of misdemeanor, and that no other question is involved in the enactment. If the appellant had been tried for assault and battery, after that

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charge had been dismissed, the second trial would have been illegal under the statute cited; but I do not think the statute should be construed further than its language imports.

[No. 4520. Decided July 20, 1903.]

ALFRED JOHNSON, *Appellant*, v. J. W. DOUGLAS, *Respondent*.

CONTRACTS — PUBLIC POLICY — DEFEATING CRIMINAL PROSECUTION.

A deposit made by a party accused of seduction, which was to be paid to the complaining witness upon dismissal of the prosecution, is void as against public policy, and an action by accused to recover the same is properly dismissed.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Bedford Brown and *C. K. Holloway*, for appellant.

C. S. Voorhees and *Reese H. Voorhees*, for respondent.

PER CURIAM.—Appellant brought this action in the superior court of Spokane county to recover the sum of \$500 deposited with the respondent.

From the record it appears that a criminal charge was pending in the courts of British Columbia against this appellant for the alleged seduction of one Amanda Povolo. That for the purpose of nullifying and setting at naught said criminal proceedings this appellant connived and bargained with the said Amanda Povolo to that end, and induced her to accompany him to Spokane, where he made the deposit of the sum named with respondent, "to be paid to Amanda Povolo in the event and when the cause

against Alfred Johnson for seduction of said Amanda Povolo is dismissed and said Johnson fully discharged, and exonerated from any charge against him by reason of the aforesaid criminal charge. That subsequently appellant was released from said criminal charge. He thereupon made demand on the respondent for the return to him of such deposit, and upon refusal of respondent to comply instituted this action.

The object of such deposit was to defeat a regular proceeding in a court of justice, and is, therefore, void, as against public policy. Courts will not lend their aid to enforce such contracts (*Standard Furniture Co. v. Van Alstine*, 22 Wash. 670, 62 Pac. 145, 51 L. R. A. 889, 79 Am. St. Rep. 960), nor to assist a party to rescind such a contract after he has received its benefits.

The judgment is affirmed.

[No. 4572. Decided July 20, 1908.]

THE STATE OF WASHINGTON, *Respondent*, v. PETER TIEMAN, *Respondent*.

STATUTES — TITLE.

It was competent for the legislature to enact the penal code of 1881 with the comprehensive title, "An act relative to crimes and punishments and proceedings in criminal cases," but provisions of a civil nature could not be included therein.

SAME — BASTARDY PROCEEDINGS.

A bastardy proceeding against a putative father for the support of his illegitimate child, commenced by summons and tried as a civil action, with judgment and execution against his property, is a civil proceeding, and the provisions therefor enacted in 1881 as part of the penal code, are not embraced within the title of the act, which relates only to crimes and punishments.

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BASTARDY — COMMON-LAW LIABILITY.

There is no common-law obligation on the part of a putative father to support his illegitimate child.

Appeal from Superior Court, Skagit County.—Hon. GEORGE A. JOINER, Judge. Reversed.

Thomas Smith, for appellant.

J. C. Waugh, (*M. P. Hurd*, of counsel), for the State.

The opinion of the court was delivered by

FULLERTON, C. J.—This is a bastardy proceeding, begun in the superior court of Skagit county by one John Jungquist, who alleged in his complaint that an unmarried woman (naming her) was pregnant with child, which, if born alive, would be a bastard, and charged the appellant with being the father of such unborn child. Summons was duly issued and served on the appellant, after which he appeared in the action and demurred to the complaint on various grounds, some of which went to the jurisdiction of the court. On his demurrer being overruled, he pleaded not guilty, and a trial was had, resulting in a verdict of guilty, on which he was adjudged to make a monthly payment to the mother of the child for the child's support. He appeals from the judgment entered against him.

The act under which the proceedings against the appellant were had first appears on the statute books in the Code of 1881. It was enacted by the territorial legislative assembly of that year as a part of a general penal code under the title "An act relative to crimes and punishments and proceedings in criminal cases." The act was the second of a series of four, intended to form a general code, the others being denominated a "code of civil procedure," a "probate practice act," and a "justices' practice act." The sections of these several acts were numbered consecutively in the enrolled bills throughout the entire series, those of

the penal code being numbered from 764 to 1296, inclusive, and the particular act in question being sections 1214 to 1221 of that code. The contention of the appellant is that this act was never legally enacted, because the title of the bill of which it formed a part was not broad enough to include it.

The act of Congress (Act March 2, 1853, ch. 90, § 6, 10 St. at Large, 175) providing for the organization of the territory of Washington empowered its legislative assembly to legislate upon all rightful subjects of legislation not inconsistent with the constitution or laws of the United States, but provided that "every law shall embrace but one object, and that shall be expressed in the title." Construing a similar provision in the state constitution, this court held in *Marston v. Humes*, 3 Wash. 267 (28 Pac. 520), that under the title "An act to provide a Code of Civil Procedure," it would be legal for the legislature to enact an entire civil code, although such an act would include numerous subheads and subjects; saying that "the legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division." Tested by this rule, it is clear that it was competent for the legislature, under the title which it adopted for the act in question, to include in the body of the act anything which related to crimes and their punishment and proceeding of a criminal nature; but it is equally clear, also, that under such a title provisions of a civil nature cannot be legally enacted. Whether, therefore, the particular act in question is a valid or invalid enactment depends upon what answer is given to the question, is it a criminal proceeding? Looking to the statute itself, it seems to contain none of the elements of

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a criminal proceeding. The action is commenced by the filing of a complaint, and the defendant is brought in by the service of a summons in the usual method, and the issue, if one is made, is tried as an ordinary civil action. If the accused is found guilty, a judgment is entered, charging him with the support of the bastard child in such sum or sums, and payable in such manner, as the court shall direct, which is collected by execution issued by the clerk. The proceeding must be instituted before the superior court. There is no preliminary complaint, no arrest, no fine or punishment of any kind whatever, inflicted as punishment, and the court is specially given power to "at any time enlarge, diminish, or vacate any order or judgment rendered in the proceeding herein contemplated on such notice to the defendant as the court or judge may prescribe." Plainly, the proceeding has but one purpose, namely, to charge the property and earnings of a father with the maintenance of his illegitimate child—a proceeding which, from its very nature, must be civil, as it operates against property, and not against the person. Courts of states having the same or similar statutes hold with uniformity that the statute gives rise to a civil, and not a criminal, liability. In Iowa, which has a statute so near the counterpart of our own as to lead to the belief that ours was taken therefrom (see Code 1873, § 4715 *et seq.*, Code 1897, § 5697, *et seq.*), the courts have uniformly held that proceedings thereunder were civil, and not criminal. *Holmes v. State*, 2 G. Greene, 501; *Black Hawk County v. Cotter*, 32 Iowa, 125; *State v. Pratt*, 40 Iowa, 631; *McAndrew v. Madison County*, 67 Iowa, 54 (24 N. W. 590); *State v. Severson*, 78 Iowa, 653 (43 N. W. 533); *State v. Johnson*, 89 Iowa, 1 (56 N. W. 404). And in Nebraska, where the statute provides the remedy of

arrest and imprisonment for the purpose of enforcing the judgment rendered, it is held that the proceeding is essentially a civil, and not a criminal, action. *In re Application of Walker*, 61 Neb. 808 (86 N. W. 510). See, under similar statutes: *Powell v. State ex rel. Salyers*, 96 Ind. 108; *Reynolds v. State ex rel. Cooper*, 115 Ind. 421 (17 N. E. 909); *In re Cannon*, 47 Mich. 481 (11 N. W. 280); *People v. Harty*, 49 Mich. 490 (13 N. W. 829); *Scharf v. People*, 134 Ill. 240 (24 N. E. 761); *Young v. Makepeace*, 103 Mass. 50; *Williams v. State*, 117 Ala. 199 (23 South. 42); *Chambers v. State*, 45 Ark. 56. While there are courts which hold that the object of the statute is as much to punish the father as it is to protect the state from the child's support, and that the action is, therefore, criminal in its nature, they are usually in jurisdictions where the statutes provide a punishment for the putative father in addition to providing for the child's support. In jurisdictions where the statutes furnish only a scheme to compel the putative father to support the child, they are almost uniformly held to provide a civil remedy. We are constrained to hold, therefore, that the statute in question could not lawfully be enacted as part of a general enactment having for its title a reference to criminal objects and procedure only, and that it is not, and never was, a valid enactment.

It is said, however, that this conclusion does not necessarily render the judgment appealed from void, because the judgment can be sustained under the common-law obligation of a father to support his child. But in the absence of a statute there is no legal obligation on the part of a putative father to support his illegitimate child. At the common law a bastard was *nullius filius*, and was incapable of inheriting either from his putative father or

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his mother, and, as that law was administered in England, neither a father nor mother was under any legal obligation to support an illegitimate child. The obligation was imposed on the mother by statute, but then only until the child reached the age of sixteen years, or acquired a settlement, and the mother remained unmarried. See 4 and 5 Wm. IV, ch. 76, § 71; 5 Cyc. 638. In some of the states of the Union the English rule with reference to the mother has not been followed, but, so far as we are advised, it is universally held that a statute must be found imposing the obligation on the putative father before he can be charged with the child's support.

The judgment appealed from is reversed, and the cause remanded, with instructions to enter a judgment dismissing the action.

HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4597. Decided July 20, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. MATT
SNIDER, *Appellant*.

CRIMINAL LAW — INFORMATION — DUPLICITY — WAIVER.

An objection to an indictment or information on the ground of duplicity is waived if not made until after verdict.

ASSAULT WITH INTENT TO MURDER — INFORMATION.

An information held sufficient to charge an assault with intent to commit murder, under Bal. Code, § 7057.

VERDICT — OBJECTIONS.

Failing to object to the form of a verdict does not preclude the defendant from objecting to its substance, and to the sentence as not warranted by the verdict.

ASSAULT — INTENT TO INFLECT BODILY INJURY — PARTIAL VERDICT.

Upon an information for assault with a deadly weapon with intent to murder, under Bal. Code, § 7057, a verdict finding the

defendant guilty of "assault with a deadly weapon" does not warrant a sentence for an assault with intent to inflict bodily injury under Bal. Code, § 7058, but only for a simple assault, as the intent is an essential element of the offense and must be found as a fact by the jury.

SAME.

In such case, while the verdict is to be liberally construed, the intention of the jury to find an intent to inflict bodily injury cannot be inferred from the fact that the information charges, and the instructions define, that offense.

SAME.

A partial verdict must specify the particular offense.

SAME — SURPLUSAGE IN VERDICT.

There is no such offense as assault with a deadly weapon, under the law of this state, and the words "with a deadly weapon" in a verdict are to be treated as surplusage.

Appeal from Superior Court, Skagit County. Hon. GEORGE A. JOINER, Judge. Reversed.

G. C. Israel and *E. C. Million*, for appellant.

M. P. Hurd and *J. C. Waugh*, for respondent.

The opinion of the court was delivered by

ANDERS, J.—The appellant and one Julius Snider were jointly tried in the superior court of Skagit county upon an information charging and alleging that:

"The said Matt Snider and Julius Snider, in the county of Skagit, state of Washington, on the 9th day of August, A. D., 1902, then and there being, in a rude, insolent, and angry manner, unlawfully, feloniously, wilfully; and purposely, and of their deliberate and premeditated malice, did attempt to kill and murder one Alexander Brown, coupled with the present ability to carry into execution such attempt, by assaulting, striking, shooting, and wounding him, the said Alexander Brown, with a deadly weapon, towit: A revolver loaded with powder and ball, with intent to kill and murder him, the said Alexander Brown, no considerable provocation appearing therefor."

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Each of the defendants entered a plea of not guilty, and both were subsequently tried together by a jury. After the cause was submitted to the jury and considered by them, they returned the following verdict:

"We, the jury impaneled to try the above entitled cause, say that we find the defendant, Matt Snider guilty of the crime of assault with a deadly weapon, and that we find the defendant, Julius Snider, guilty of assault and battery."

This verdict was received by the court and filed, and the jury discharged, and thereafter, and before sentence, the appellant moved the court to arrest judgment and sentence on the verdict as returned by the jury as to any offense save and except that of simple assault. This motion and request was denied, and the court thereupon sentenced the appellant to imprisonment in the state penitentiary for the period of two years. From that judgment and the order of the court denying the said motion this appeal is prosecuted.

Section 7057, Bal. Code, provides that, "An assault with an intent to commit murder, rape, the infamous crime against nature, mayhem, robbery, or grand larceny shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years;" and § 7058 declares that, "An assault with a deadly weapon, instrument, or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show a willful, malignant, and abandoned heart, shall subject the offender to imprisonment in the penitentiary not exceeding two years, or to a fine not exceeding five thousand dollars, or to both such fine and imprisonment." It is not claimed on the part of the appellant that the information does not charge

the crime of an assault with an intent to commit murder, under § 7057 of the statute above quoted. On the contrary, it seems to be conceded by the learned counsel for the appellant that the information sufficiently charges that offense; but they suggest, without specially urging, the proposition that the offense of an assault with a deadly weapon with intent to inflict a bodily injury cannot be included in the charge of an assault with intent to commit murder, for the reason that it is a distinct and independent crime. Our statute provides, it is true, that the indictment or information must charge but one crime, and in one form only, except that, when the crime may be committed by use of different means, the indictment may allege the means in the alternative (Bal. Code, §6844), and therefore, in this state, an information or indictment which charges more than one offense is bad, and, if objected to at the proper time and in the proper manner, must be set aside. But an objection on the ground of duplicity will be deemed waived if not made until after verdict. *Territory v. Heywood*, 2 Wash. T. 180 (2 Pac. 189); *State v. Jarvis*, 18 Ora. 360 (23 Pac. 251). And inasmuch as the objection to the information now under consideration was not presented to or determined by the trial court, it cannot be considered on this appeal. It cannot be made for the first time in this court.

The sole question properly presented for our determination is whether the verdict of the jury warrants the judgment and sentence pronounced by the court. It is provided in § 6955, Bal. Code, that upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit

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the offense; and § 6956 further provides that in all other cases, the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information. We think the information in this case clearly charges the appellant with the crime of an assault with an intent to commit murder under § 7057 of the Code, and the appellant might have been properly convicted of that offense, provided the proof of guilt was sufficient to satisfy the jury. And under § 6956, *supra*, the appellant could have been found guilty, upon sufficient evidence, of any offense *necessarily* included within the offense with which he was charged in the information, and properly alleged. As we have seen, the jury in this case by their verdict found the appellant "guilty of assault with a deadly weapon." The learned judge of the superior court considered this verdict as a finding of the jury that the appellant was guilty of the crime of an assault with a deadly weapon with intent to inflict upon the person of Alexander Brown a bodily injury, and accordingly sentenced him to imprisonment in the penitentiary for the maximum period prescribed by §7058, *supra*, of the statute. Assuming that the crime for which appellant was sentenced was sufficiently alleged in the information, the question arises whether or not the jury, by their verdict, actually found him guilty of that offense. It is insisted by the learned counsel for the respondent that, inasmuch as appellant did not object to the form of the verdict, or to its reception by the court, it must be presumed in aid of the judgment that he consented to the verdict, and that he cannot assign error on account thereof; and they cite *State v. Greer*, 11 Wash. 244 (39 Pac. 874), in support of their position. But it is a sufficient

answer to that argument simply to say that appellant is interposing no objection either to the form of the verdict or to the action of the court in receiving it. His objection goes to the substance, and not merely to the form, of the verdict; and he contends that the judgment is erroneous for the reason, before stated, that it is not justified by the verdict upon which it is founded.

It is further contended, in effect, on behalf of the respondent, that, conceding this verdict to be not technically formal, it is nevertheless sufficient, when considered with reference to the averments of the information and the instructions of the court, to indicate the intent of the jury, and that the intent of the jury, when ascertained, will be given effect. It is true that full force and effect must be given to the intent and meaning of the jury, as expressed in their findings, and that verdicts are to receive a reasonable construction, and are not to be interpreted by the application of any technical rule of construction. It is said in 22 Enc. Pl. & Pr. p. 955, cited by respondent, that:

“In the construction of a verdict the first object is to learn the intent of the jury, and when this can be ascertained such effect should be allowed to the findings, if consistent with legal principles, as will most nearly conform to the intent. The jury’s intent is to be arrived at by regarding the verdict liberally, with the sole view of ascertaining the meaning of the jury, and not under the technical rules of construction which are applicable to pleadings. The language of the verdict should not be construed according to the technical import of the words employed, but should be understood in the sense probably intended by the jury. In the construction of a verdict resort may be had to the pleadings to ascertain its true intent. The verdict should not be read as an abstraction, but as a step in the cause, to be construed and applied reasonably in the light of all the proceedings.”

Viewed in the light of the rule thus laid down, and which is certainly as liberal as could well be stated, what is the offense of which the appellant was found guilty? It is claimed on behalf of the respondent that the jury plainly intended to find him guilty of an assault with a deadly weapon (a loaded pistol), with intent to inflict bodily injury, because that crime was charged in the information, and was defined by the court in its instructions to the jury, and because the court properly told the jury what facts must be established by the evidence beyond a reasonable doubt before they could find appellant guilty of the same. But it seems to us that this argument, though sound, so far as it is applicable, overlooks the fundamental principle that, after all, it is the *language of the verdict* that the court is to construe, in ascertaining the intent of the jury. It is not the province of the court, in any case tried by a jury, to find the accused guilty or not guilty of any particular offense with the commission of which he may be charged. That is the exclusive province of the jury. And if the jury in a given case return a verdict the meaning of which cannot be fully and fairly ascertained from its language by the application of the above mentioned rules of construction, it is good for naught, and must, of necessity, be set aside. The courts are naturally and habitually inclined to support the verdict of the jury, and will do so whenever enough material can be gathered from the terms of the finding and the record of the proceedings to constitute a verdict complete in all its essential details. 22 Enc. Pl. & Pr. 960. But, in this instance, the verdict is entirely silent as to one of the essential elements of the crime of which the appellant was adjudged guilty, and for which he was sentenced, namely, the intent with which he made the assault upon

Brown. Nor is there anything in the record showing such intent. Had the appellant been informed against for this specific felony—an aggravated assault—a general verdict of guilty would have been good under our statute, but in this case the jury returned what is known as a partial verdict; that is, a verdict finding the accused guilty of only a part of the crime charged in the information; and in such cases it is necessary for the jury to specify the particular offense of which they find the defendant guilty. We think the correct rule is well stated by Mr. Bishop in the following language:

“If the jury would convict the defendant of a part of the accusation and acquit him of the residue, whether a part of a count or a part of the counts, their finding must convey the idea, which in form of words will depend on the offense and particular averments.” 1 Bishop, New Criminal Procedure, § 1005a, subd. 3.

It is possible, of course, that the jury intended to convict the appellant of the statutory offense of an assault with a deadly weapon with intent to inflict a bodily injury, but, if such was their intention, they utterly failed to express the idea by the words they employed. It is the intent with which the injury is inflicted, or attempted, that constitutes the offense of an assault with a deadly weapon, with intent to inflict a bodily injury. *State v. Malcom*, 8 Iowa, 413. And the intent, being a necessary ingredient of the offense, must not only be alleged in the information but found as a fact by the jury. See *State v. Dolan*, 17 Wash. 499 (50 Pac. 472); *State v. Daley*, 41 Vt. 564.

Under the law of this state there is no such crime as “assault with a deadly weapon,” but, rejecting the words “with a deadly weapon” as surplusage in this indictment, we still have a clear finding of guilty of assault, which

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is merely a misdemeanor punishable by fine and imprisonment in the county jail, and which is necessarily included in the offense charged in the information. This view is supported, we think, by numerous decisions in analogous cases, among which are: *Ex parte Ah Cha*, 40 Cal. 426; *Ex parte Max*, 44 Cal. 581; *People v. English*, 30 Cal. 214; *People v. Cozad*, 1 Idaho, 167; *Wilson v. State*, 25 Tex. 169; *O'Leary v. People*, 4 Parker Cr. Rep. 193; *People v. Davis*, 4 Parker Cr. Rep. 61. See, also, *Commonwealth v. McGrath*, 115 Mass. 150.

We are constrained to hold that appellant's objection that the judgment is not warranted by the verdict is well taken, and must be sustained.

The judgment and sentence of the court is reversed, and the cause remanded to the superior court, with direction to sentence the appellant on the verdict as and for a simple assault.

FULLERTON, C. J., and MOUNT and HADLEY, JJ., concur.

[No. 4628. Decided July 20, 1903.]

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ROTHCHILD BROS., *Appellant*, v. NICHOLAS ROLLINGER
et ux., *Respondents*.

IRRIGATION — ORGANIZATION OF DISTRICT — PETITION.

Bal. Code, § 4166, providing for the organization of an irrigation district upon the petition of "fifty or a majority of holders of title," does not require fifty in any event, but a petition by forty-two freeholders, constituting more than a majority, is sufficient.

SAME — ASSESSMENTS — TAX SALE.

Bal. Code, § 4192, regulating the sale of lands for delinquent irrigation assessments, does not require the officer making the

sale to designate in writing any particular portion which he proposes to sell, but it is sufficient if the record recites that he designated the portions at the time of sale.

SAME — INADEQUACY OF PRICE.

Inadequacy of price is not a valid objection to the sale of land for taxes.

TAX DEED — RECORDING — BONA FIDE PURCHASER — LIEN FOR TAXES PAID.

The owner of land sold for special irrigation taxes several years after he had acquired title cannot object that the tax deed was not recorded, and that he was an innocent purchaser by reason of subsequently paying general taxes; but he has a lien on the land for the taxes paid by him in good faith.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Modified.

L. A. Vincent, for appellant.

Graves & Englehart, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Action to remove cloud, quiet title, and obtain possession of certain real estate in Kittitas county. A decree was entered in favor of the defendants by the court below. Plaintiff appeals. The facts are as follows: Prior to the year 1900 the appellant was the owner of the land in question. This land is located in what is known as the "Middle Kittitas Irrigation District," organized under the act of March 20, 1890. In the year 1899, upon the neglect and refusal of the board of directors and other officers of the said Middle Kittitas irrigation district to assess and levy taxes to pay the accruing interest upon outstanding bonds theretofore issued by the said district, the board of county commissioners of Kittitas county levied a tax for such purpose upon the lands in controversy and other lands in said district. Bal. Code, § 4187. These taxes upon appellant's land became de-

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linquent, and thereafter, on March 8, 1900, the said lands were sold to pay these taxes. After the year for redemption had expired, a deed was issued to the purchaser, J. W. Witherop, who thereafter sold the lands to respondents, who took possession thereof, and still retain the same. The deed issued to Witherop was not placed of record. On February 18, 1902, and prior to the commencement of this action, the appellant, in order to protect its title, paid the treasurer of Kittitas county the sum of \$917.55 (being the general state and county taxes then due and delinquent upon the land), and also paid the further sum of \$94.09 (being irrigation district taxes due since the sale of the land to Witherop). Other facts necessary to an understanding of the points involved will be stated hereafter. It is conceded that the title and right of possession of respondents are based upon the tax deed issued upon the sale for delinquent taxes for the irrigation district. It is contended by appellant that this deed is void for four reasons: (1) That the Middle Kittitas irrigation district was not organized according to law, because the petition for organization did not contain the names of fifty freeholders; (2) that the lands were not sold according to law, because the officer making the sale did not designate in writing a part of the tract, less than the whole, which would be offered for sale; (3) that the lands were sold for a grossly inadequate price, and (4) that the deed was not filed for record in the office of the county auditor; that appellant was a *bona fide* purchaser of the lands, without notice of the claim of respondents. We shall discuss these points in the order stated.

1. The statute, at § 4166, Bal. Code, provides:

“Whenever fifty or a majority of holders of title or evidence of title holding land susceptible of one mode of irrigation from a common source, and by the same sys-

tem of works, desire to provide for irrigation of the same, they may propose the organization of an irrigation district," etc.

The evidence shows that the petition for the organization of the district contained the names of but forty-two freeholders, and that this number was a majority of all the freeholders owning land within the proposed district. It is contended by appellant that in any event no less than fifty freeholders can institute proceedings to organize an irrigation district, and, since that number did not sign the petition to organize this district, therefore the organization thereof is void. There is no provision in the act of 1890 limiting the organization of these districts, unless it is found in the clause "whenever fifty or a majority of the holders of title" desire to organize such district they may propose the organization under the act. We think the legislature intended by this language to indicate that fifty freeholders, in any event, may institute proceedings to organize an irrigation district, and that the clause "or majority of the holders of title" refers to communities where fifty would not constitute a majority of the freeholders within the proposed district. To hold otherwise would be to say that no less than a majority in any case could institute such proceedings. Counsel for appellant cite us to the following cases from California: *Directors of Fallbrook Irrigation District v. Abila*, 106 Cal. 355 (39 Pac. 794); *In re Central Irrigation District*, 117 Cal. 382 (49 Pac. 354); and *In re Madera Irrigation District*, 92 Cal. 296 (28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106)—as sustaining his contention. The irrigation statute of this state is almost identical with the California statute known as the Wright Law. The supreme court of California held in those cases, in substance, that it was necessary for

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fifty freeholders to sign the petition; but these were evidently cases where fifty was not a majority of the freeholders of the proposed district, and therefore came within the express provision requiring fifty freeholders. If the statute requires a majority of the freeholders to sign the petition, then fifty is not sufficient unless that number constitutes a majority. As we understand the California cases above cited, they do not support the appellant's contention, but are inferentially opposed thereto. The question presented here was not raised or discussed in either of those cases, and no case has been called to our attention where the precise question has been decided. Our statute, after providing for notice and a submission of the question of the forming of the district to an election by the qualified electors, who are also required to be freeholders, provides that the board of county commissioners shall canvass the returns, "and if upon such canvass it appears that at least two-thirds of all the votes cast are 'Irrigation district, yes,' the said board shall by an order entered on their minutes declare such territory duly organized as an irrigation district," etc. This provision of the statute amply provides for the protection of all persons interested, so that no advantage can be taken of any person owning property in the proposed district. While a minority may institute the proceedings in a large district, the majority controls the organization thereof. We think the legislature did not intend that in populous districts a majority was required in order to institute the proceedings; but, where less than fifty sign the petition, it must appear that the less number is a majority. It so appears in this case. Questions relating to the validity of the organization of this district have been before this court in three prior cases (*Board of Directors v. Peter-*

son, 4 Wash. 147, 29 Pac. 995; *State ex rel. Witherop v. Brown*, 19 Wash. 383, 53 Pac. 548; and *Kinkade v. Witherop*, 29 Wash. 10, 69 Pac. 339), and each time this court has upheld the organization. Upon the strength of these decisions large amounts of money have been invested in the bonds issued by the district. To now hold the organization thereof invalid upon a question which was suggested in at least one of those cases, but which was not deemed of sufficient importance to be discussed either by counsel or by the court, would in effect overrule all those cases, which we are not inclined to do.

2. Section 4192, Bal. Code, provides:

“The owner or persons in possession of any real estate offered for sale for assessments due thereon may designate in writing to the secretary, prior to the sale, what portion of the property he wishes sold, if less than the whole; but if the owner or possessor does not, then the secretary may designate it, and the person who will take the least quantity of the land . . . is the purchaser.”

The owner or possessor of the lands offered for sale in this case did not designate in writing or at all any portion of the land to be sold. The county treasurer, who sold the land in place of the secretary, did not designate any particular portion thereof in writing which he proposed to offer for sale, except that the record of the sale shows the following:

“The treasurer and collector aforesaid proceeded to offer the same for sale, designating the least quantity and the least portion of interest in the land that would be sold for the assessments and percentage which were by law a lien upon it, to wit: He offered for sale at public auction separately each lot, parcel, or tract of land as herein below separately described, and at said auction, and upon said offers of sale, J. W. Witherop, the party of the second part hereto, was the bidder who was willing to take

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the least quantity of, or smallest portion of interest in, each of said herein below described lots, parcels, and tracts of land, and pay the assessments and charges due on each of the same, and his was the highest and best bid for each of the said lots.”

This was a sufficient designation. The statute does not require the secretary or person selling the land to file his designation in writing, as an independent paper and as part of the record of sale. If the owner desires only a portion of the real estate sold, then he must file with the secretary a written request to that effect, designating the portion. When no such request is made, the secretary may designate at the sale what parcels he will offer, or what portion of the parcels, and his return thereon will be held to be sufficient compliance with the statute. The sale appears, both by the record and the oral evidence, to have been sufficient in this respect. *Doland v. Mooney*, 79 Cal. 137 (21 Pac. 436); *Hewes v. McLellan*, 80 Cal. 393 (22 Pac. 287); *State ex rel. Schmoele v. Galloway*, 44 N. J. Law, 145; *Southworth v. Edmands*, 152 Mass. 203 (25 N. E. 106, 9 L. R. A. 118).

3. The lands sold were bid in by the purchaser for a small fraction of their assessed or real value, but there is no showing of unfairness in the sale or want of statutory notice. All the requirements of the law were complied with. If mere inadequacy of price is held to be a valid objection to a sale for taxes, the collection of taxes in this manner would be greatly embarrassed, if not rendered altogether impracticable. In *Black on Tax Titles* (2d ed.) § 238, the correct rule is stated as follows:

“Where land is sold for taxes, the inadequacy of the price given is not a valid objection to the sale. This rule arises from necessity; for if a fair price for the land were an essential to the sale, it would be useless to

offer the property. Indeed, it is notorious that the prices habitually paid by purchasers at tax sales are grossly out of proportion to the value of the land."

4. Appellant lastly urges that the deed was not placed of record, and that it knew nothing of it, and therefore was an innocent purchaser. This position cannot be maintained in this case, because the land was not sold, nor the deed issued, until long after the appellant became the owner of the land. The appellant purchased the land in 1894. It was sold in 1900 for taxes levied in 1899. But after the deed had been issued, and before it was recorded, the appellant paid taxes upon the land to the amount of \$1,011.64 in order to protect its own title. The trial court refused the appellant relief for the money thus advanced. In this respect the court was in error. The appellant paid these taxes in good faith, believing it was the owner of the land and entitled to the possession thereof. Under the authority of *Packwood v. Briggs*, 25 Wash. 530 (65 Pac. 846); *Denman v. Steinbach*, 29 Wash. 179 (69 Pac. 751), and *Burgert v. Caroline*, 31 Wash. 62 (71 Pac. 724), the lower court should have given appellant a judgment for the amount of the taxes, and declared the same a lien on the land for the payment thereof.

The judgment of the lower court is therefore modified in this respect, and the cause is remanded, with instructions to the lower court to enter a judgment in favor of the appellant against respondents for the sum of \$1,011.65, with legal interest since February 18, 1902, and ordering the sale of said lands described in the complaint to satisfy the said judgment. In other respects the judgment is affirmed, with costs in favor of the appellant.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4573. Decided July 21, 1903.]

THE PROSPECTORS' DEVELOPMENT COMPANY, *Respondent*,
v. GEORGE BROOK *et al.*, *Appellants*.

APPEAL — TIME OF TAKING — SUSPENSION OF JUDGMENT.

Where, after judgment in an equitable action tried by the court, a motion for a new trial is made, supported by affidavits, and counter affidavits are filed, and it is stipulated that "all the facts and evidence taken in the cause should be considered" on the decision of the motion, "with as full effect as if said judgment had not been rendered," the judgment is waived and suspended and the time for taking an appeal therefrom does not begin to run until the entry of the order on the motion.

QUIETING TITLE — MINING LOCATIONS — FINDINGS UPON DISPUTED TESTIMONY.

In an action to quiet title to a mining claim where there were several successive locations, findings for the plaintiff claiming under the second location will not be disturbed upon conflicting testimony as to the fact of the first location, and the required assessment work thereunder, where there was much conflict as to the plaintiff's assessment work, and these points were resolved in favor of the plaintiff by the lower court after hearing all the evidence and seeing the witnesses.

Appeal from Superior Court, Okanogan County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

Happy & Hindman, for appellants.

Edward W. Taylor, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is a suit in equity to quiet title to a mining claim situated in Okanogan county. In the year 1892 one H. F. Smith, since deceased, attempted to locate a mining claim in Mt. Chapaca and Similkameen mining district, known as the "Calcite." In the year 1894 one Frank Grogan located a claim known as

the "California Mine" on the same ground. Subsequently he sold and transferred this mine to the plaintiff. In the year 1899 J. M. Hagerty relocated the same ground as the "Eagle No. 1," and subsequently sold the same to defendant Brook. The other defendants claim an interest in this mine. After the issues were made up, a trial was had, and findings and a decree were made in favor of the respondent. These findings and the decree were filed and entered on October 16, 1901. Thereupon the appellants served and filed a motion for new trial. This motion was supported by affidavits. Counter affidavits were filed by respondent. Subsequently it was stipulated by the attorneys for the parties in open court "that said motion should be taken up and argued, and all the facts and evidence taken in said cause should be considered by the court in the decision of said motion, with as full force and effect as if said judgment had not been rendered." The motion for a new trial was subsequently argued, and submitted to the court for decision. On September 23, 1902, the motion was denied, and an order to that effect entered. On October 3, 1902, this appeal was taken by the defendants. Respondent now moves to dismiss the appeal because the notice was not served within the time allowed by law—ninety days from the entry of the judgment. The stipulation above stated was, in effect, a waiver of the judgment and its entry, and was substantially a re-submission of the cause to the court upon the merits. This being true, the judgment was at least suspended pending the decision upon the motion so that the time for an appeal did not run and did not begin to run until the entry of the order upon the motion. This date, September 23, 1902, determined the time from which the time for appeal began to run. The appeal was, therefore, in time, and the motion is denied.

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Syllabus.

Upon the merits of the case the questions presented are all questions of fact. The evidence of the respondent tends to show that Smith, the first locator of the ground, had not staked the same so that the boundaries could be readily traced, or traced at all, and that the required assessment work had not been done, and that the ground was vacant and unoccupied in 1894, when Grogan located the "California Mine" thereon. The evidence of the appellants tends to show that the ground was not vacant when Grogan located the same in 1894, and it is argued that Grogan's location was, therefore, void. Appellants' evidence also tends to show that Grogan had not done the required assessment work in 1899, when Hagerty relocated the ground as the Eagle No. 1. There is much conflict in the evidence upon these points. The trial court, after seeing the witnesses and hearing all the evidence, found in favor of the respondent as to these facts. After carefully reading the record, we have concluded that there is nothing in the case to warrant a reversal, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4623. Decided July 21, 1903.]

GEORGE W. THOMAS *et ux.*, Respondents, v. LINCOLN COUNTY *et al.*, Appellants.

APPEAL — STATEMENT OF FACTS — TIME OF FILING.

A statement of facts filed more than ninety days after the entry of final judgment is of no avail, and if the questions presented depend on the statement the appeal must be dismissed.

SAME — EXTENSION OF TIME.

The parties cannot by stipulation extend the time for filing a statement of facts beyond the ninety days provided by Bal. Code, § 5062, which is mandatory.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Appeal dismissed.

R. M. Dye, N. T. Caton and Martin & Grant, for appellants.

Myers & Warren, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Respondents' motion to strike the statement of facts and dismiss this appeal must be granted. No questions are presented which do not depend upon the statement of facts. The statement of facts was not filed until after the expiration of ninety days from the entry of final judgment. This court has repeatedly held that a statement of facts filed more than ninety days after the entry of final judgment will be of no value to appellant, and will, on motion of respondent, be disregarded or stricken from the files. *Loos v. Rondema*, 10 Wash. 164 (38 Pac. 1012); *State v. Seaton*, 26 Wash. 305 (66 Pac. 397); *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31 (67 Pac. 374); *Crowley v. McDonough*, 30 Wash. 57 (70 Pac. 261).

Counsel for appellants, however, insist that since the respondents stipulated that appellants might have until February 15, 1903, which was one hundred days after the entry of the judgment, in which to file the statement, they ought not to be heard now to raise the question. There is much force in this contention. But the statute, Bal. Code, § 5062, provides, in substance, that the time for filing a statement of facts may be enlarged by stipula-

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Syllabus.

tion of the parties or by order of the court, "but not for more than sixty days additional in all," to the thirty days allowed without order or stipulation. This provision of the statute is plain and mandatory, that neither the court, by order, nor the parties, by stipulation, may extend the time beyond ninety days from the entry of the judgment. The stipulation in this case extending the time was therefore in violation of the plain, mandatory terms of the statute, and will for that reason be disregarded.

The cause is therefore dismissed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4640. Decided July 21, 1903.]

MARTIN BAILEY, *Appellant*, v. CASCADE TIMBER COMPANY, *Respondent*.

MASTER AND SERVANT — NEGLIGENCE — SAFE APPLIANCES.

Where plaintiff, an engineer in charge of a donkey engine in a logging outfit, was injured by the breaking of a small and defective swamp hook, used to pull a large water tank, and the large swamp hook usually employed for that purpose was at the time attached to the donkey, holding a block in place, and no other hook was provided by the master, it is not a case of the proper selection by a servant from sufficient appliances concededly furnished by the master, but there was a dispute as to whether the master in the first instance had furnished the necessary available appliance, raising a question of negligence for the jury.

SAME — VICE PRINCIPALS.

A foreman known as the "hook tender" in charge of a logging crew, whose duty it was to give directions both as to the operations and selection of appliances for moving from one location to

32 319
35 286

another a donkey engine and a large water tank containing 600 or 700 gallons of water, by means of a swamp hook attached to a cable pulled by the engine, is, under the circumstances, a vice principal in his relations to the engineer and men of the crew and is charged with the duty of providing a sufficient swamp hook.

SAME.

Where such hook tender directs a laborer known as the "rigging slinger" to attach the swamp hook for the purpose of moving the water tank, the "rigging slinger" is a mere intermediary and the arm of the hook tender, and his negligence in selecting an insufficient swamp hook is the act of a vice principal and not that of a fellow servant.

SAME.

In such a case where the hook tender is in the immediate presence of the tank, and the large hook was only a few feet away, he owed the duty to see that the same was used.

SAME — SELECTION OF APPLIANCES.

A selection from sufficient appliances actually furnished by the master, made by the person whose duty it is to make the selection, or made under his direction, is the act of a vice-principal, and in this case raises a question of negligence for the jury, conceding that sufficient appliances were furnished.

SAME — CONTRIBUTORY NEGLIGENCE.

The contributory negligence of the engineer in starting up the engine with a hard pull without first taking up six or seven feet of slack in the cable, as was usually done, is a question for the jury, where there was evidence that he obeyed the signal of the foreman for a hard pull, and also that the defective hook would have broken with any kind of a pull.

SAME.

Contributory negligence of the engineer, in that he knew of the use of the small swamp hook and did not object to it, is a question for the jury, where he denies such knowledge.

SAME — APPEAL — DECISION — QUESTION FOR JURY.

In such a case, upon reversal, a motion to remand with instructions to have the damages assessed will be denied, as the questions of negligence and contributory negligence must be all submitted to the jury.

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Appeal from Superior Court, Pierce County.—Hon. WILLIAM H. SNELL, Judge. Reversed.

Govnor Teats, for appellant.

Fogg & Fogg and *E. M. Hayden*, for respondent:

The choosing of an appliance from among sufficient appliances furnished by the master is the act of a fellow servant, for which the master can not be held liable. 12 Am. & Eng. Enc. Law (2d ed.), 953; 20 Am. & Eng. Enc. Law (2d ed.), 78; *Prescott v. Ball Engine Co.*, 35 Atl. 224; *Young v. Boston & M. R. R. Co.*, 46 N. E. 624; *Van den Heuvel v. National Furnace Co.*, 84 Wis. 636; *Webber v. Piper*, 109 N. Y. 496; *Carroll v. Western Union Tel. Co.*, 160 Mass. 152; *Kehoe v. Allen*, 92 Mich. 464; *Ling v. St. Paul, M. & M. Ry. Co.*, 50 Minn. 160; *Dwyer v. Hickler*, 16 N. Y. Supp. 814; *Thyng v. Fitchburg*, 156 Mass. 13; *Rawley v. Colliau*, 90 Mich. 31; *Guggenheim Smelting Co. v. Flanigan*, 41 Atl. 844.

Where such duty is incidental to the use of the apparatus, it is not the duty of the master to see that the servant is diligent in using the right appliances. *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 542; *Nord Deutscher Lloyd S. S. Co. v. Ingebregsten*, 57 N. J. Law, 400; *Moynikan v. Hills Co.*, 16 N. E. 577; *Preston v. Chicago & W. M. Ry. Co.*, 98 Mich. 128; *Teetsel v. Simmons*, 34 N. Y. Supp. 972; *Richmond & D. R. R. Co. v. Dickey*, 16 S. E. 212; *Burns v. Washburn*, 36 N. E. 199.

The opinion of the court was delivered by

HADLEY, J.—Appellant was employed by respondent as the engineer of what is known as a “donkey steam engine.” The engine was operated in respondent’s logging camp for the purpose of moving and loading logs. In

the course of logging operations it became necessary from time to time to remove the engine from one location to another. It stood upon pieces of timber adjusted somewhat as the runners of a sled. Its removal was accomplished by means of the mechanism of a strong cable with hooks and pulleys so operated by the power of the engine itself that it could be slid from one point to another. A large water tank, with a capacity of one thousand gallons, was used for the purpose of storing water for use in supplying the engine with steam. The tank was also placed upon timbers so that it could be removed by the power of the engine in a similar manner. The removal of the engine to a new location had just been accomplished, and while in the act of moving the tank a swamp hook used to connect the cable with the tank timbers broke. The cable recoiled, and flew toward the location of the engine in such a manner as to strike appellant with great force, and he was thereby severely injured. He brought this suit to recover damages for his injuries. He alleges that in the operation of the said logging business the respondent had a crew of several men in charge of one Fitzpatrick, who was known as "hook tender;" that in the selection of appliances for the removal of the tank the said hook tender negligently and carelessly selected a swamp hook that was too small for the strain necessary to pull the tank, instead of selecting a large swamp hook for the purpose, as was his duty; that the swamp hook so selected was defective, in that the weld of one of the links was not properly made; that when the tank had reached a stated point, and while the rear end was elevated and the front end was down against a mound of earth and roots, with the said small and defective hook attached to it for the purpose of pull-

ing it, the said hook tender, then acting as signal man, and being in full charge, control, and operation of the hauling of the tank, negligently and carelessly gave the appellant, as the engineer of said engine, the signal which was meant and is understood to be a command to the engineer to turn the power of the engine on at full force; that, in obedience to said command and signal, appellant did turn on the full force of the engine, and thereupon the break occurred which caused his injuries. The answer affirmatively avers that the selection of the appliance which was used was with the knowledge and without the objection of appellant, and that he thereby contributed to his own injury. The latter allegation, we think, is sufficiently put in issue by the reply, although respondent suggests that the reply is insufficient as a denial thereof. It is also alleged that the selection of the appliance was made by a fellow servant, and that the negligence was that of a fellow servant. The cause was tried before a jury, and at the close of all the evidence of both parties respondent moved the court to discharge the jury and render judgment for the defendant, which motion was granted. Judgment of dismissal was entered, and the plaintiff has appealed.

Several alleged errors are discussed by appellant's counsel, relating to the court's rulings upon motions, some of which were interposed by appellant and some by respondent. For the present, however, we will discuss the motion of respondent to discharge the jury and render judgment of dismissal. It is not contended by respondent that the swamp hook which was used was of sufficient strength for the purpose to which it was applied, and we understand it to be actually conceded that it was not the proper appliance that should have been selected upon that

occasion. It is respondent's position, however, that the selection was made by a fellow servant; that the negligence which was the proximate cause of the injury was that of a fellow servant, and that the same was not caused by any negligence of the respondent as master. It is not even disputed in the evidence that the hook tender was in charge of the crew of men at that time, and that, as superintendent, it was his duty to give directions both as to the operations of the men and as to the selection of appliances that were used to assist them. The man whose delegated business it was to adjust the rigging and attach the cable by means of the hook to the tank was called the "rigging slinger." He was under the immediate direction of the hook tender, and was supposed to follow the latter's directions both as to the appliances selected and as to the manner of adjusting them. When the adjustment was made, it was the duty of the hook tender to give to the engineer an understood signal for starting the engine. While the rigging slinger was engaged in adjusting the rigging under the direction of the hook tender, the appellant, as engineer, was at his post at the engine, which he says he was oiling while waiting for the customary signal. The hook tender directed the rigging slinger to attach the cable to the tank by means of a swamp hook, not specifying whether it should be a large or small swamp hook. The small swamp hook was lying upon the top of the tank, which hook the rigging slinger took down and used to make the attachment. The hook tender meanwhile was in the immediate vicinity, and he says he supposed a large swamp hook had been used. When the attachment was made the rigging slinger notified the hook tender that all was in readiness, and the latter then gave to appellant, his engineer, a starting signal. The evi-

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dence shows that the customary signal for starting slowly was for the signalling party to raise both hands, which meant that the engineer should pull very slowly. One hand up was the signal for the hard pull, which meant that he should pull as hard as the engine could stand. The shaking or jerking of one hand when up was the signal for the hard and fast pull, which meant to pull as hard and fast as the engine could stand. The engineer received his orders by means of the signals, and was governed entirely thereby. It was his duty to obey the signals unless he was advised of some imminent danger should he obey the same. It was the testimony of appellant and of most of the witnesses that the hook tender in this instance gave the signal by raising one hand, which meant that appellant should cause his engine to pull hard. The hook tender disputes this, but it was at most merely a disputed question before the jury, and for the purposes of the motion now under consideration it must be assumed that the signal given was for the hard pull. The appellant says he started his engine in obedience to the signal for the hard pull, when the break occurred which led to his injury. The evidence shows that a large swamp hook was attached to the donkey and was holding a block in place, through which the main line ran. We discover no evidence that any other large swamp hook was available at that time. Respondent contends that this hook was not actually needed in that place, and could have been selected by the rigging slinger and attached to the tank, and, as the fellow servant of appellant, his neglect to do so cannot be charged to respondent. The large hook was, however, being used at the time for the purpose mentioned, and whether its use at the place named was necessary was really a disputed question, which it was

proper for the jury to determine. If it was required where it was, then it followed that respondent had furnished no large swamp hook that was available for use at the tank, and it was for the jury to say whether such neglect was the proximate cause of appellant's injuries. It is a well settled rule that it is the duty of the master to furnish reasonably safe and sufficient machinery and appliances for the prosecution of the work required of his employees. Under the evidence as it stood, there was, therefore a dispute as to whether the master in this instance had furnished the necessary available appliance. It was not a case where it was conceded that the necessary appliances had been furnished by the master, and that nothing remained but to make proper selection therefrom by the servant.

We think the relations of the hook tender to the crew of men, as stated above, were such as made him what is ordinarily called a vice principal, and that he then stood in the place of the master. - He directed the men, and determined both what appliances should be used and the method of adjusting them. It may be true, as argued by respondent, that he could not, in reason, have personally inspected and overseen all small details, and that such might have been properly left to the judgment of the fellow servants. On the other hand, it may also be reasoned that the detail here involved was not small or unimportant. It called for the selection and application of devices that would ordinarily be deemed sufficient to pull a large tank then containing from 600 to 700 gallons of water in addition to its own weight, and which, from its position, must also plow its way through a mound of earth and roots in front of it. We think the circumstances were such that it ought not to be said that the selection of appli-

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ances could properly be left to the judgment of a fellow servant, but that such duty properly rested with the master, acting through a directing mind, supposed to be skilled from experience in such matters. The hook tender says, however, that in directing the swamp hook to be used he meant the large one, which was ordinarily used for such pulls, and supposed the rigging slinger had used it. He was, however, in the immediate presence of the tank where the small hook was lying, and also where it was afterwards adjusted by the rigging slinger. The large hook at the engine was but a few feet away, and he could easily have seen, before starting a pull requiring such great force, that the proper appliance had actually been used. Under such circumstances it certainly should not be said that, as representing the master, he owed no duty to the appellant and others present, whose safety was involved, to actually see that the proper appliance to secure such safety had been put in its place. If the large swamp hook was at that time available for use, he could have withheld movement until he knew it was in place; and if that hook could not be removed from the position it then occupied without seriously interfering with the operation of the moving mechanism, then there is evidence to the effect that it was his duty not to direct any movement at all. When the hook tender directed the rigging slinger to select and adjust the hook, he used him as a mere intermediary for that purpose, and as such he was but the arm of the hook tender, the vice principal, and was not a fellow servant. The selection and adjustment of the appliance was, therefore, in effect done by the vice principal himself, and he thereafter gave appellant the starting signal. If that signal was wrong when viewed in connection with the mechanism applied, then the master was guilty of negli-

gence. *Sroufe v. Moran Bros. Co.*, 28 Wash. 381 (68 Pac. 896, 58 L. R. A. 313). That the hook tender in the case at bar was a vice principal is sustained by the above case, and also by the following, as well as other decisions of this court not cited: *Nelson v. Willey Steamship & N. Co.*, 26 Wash. 548 (67 Pac. 237); *Uren v. Golden Tunnel Mining Co.*, 24 Wash. 261 (64 Pac. 174); *Allend v. Spokane Falls & N. Ry. Co.*, 21 Wash. 324 (58 Pac. 244); *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537 (53 Pac. 727).

It has already been stated that it is disputed in this case that respondent, as master, had actually furnished the necessary available appliance in the way of a large swamphook. But, assuming that it had done so, as respondent insists, then the recent case of *Wall v. Marshutz & Cantrell*, 138 Cal. 522 (71 Pac. 692), decided by the supreme court of California February 19, 1903, seems to be particularly in point here. There one was injured, while employed in a foundry, by the falling of an iron plate, which fell by reason of a defective clamp, selected by the person who had charge of the selection of the tools used in the work. It was contended that, since the ordinary and usual appliances for lifting weights had been furnished by the master, the selection of the particular clamp used was the act of a fellow servant. The court, however, held that the selection made was the act of a vice principal, since the duty rested upon him to select the tools for doing the work from among those furnished by the master. Such was the duty of the hook tender in the case at bar. The selection was made under his direction, and, as we have seen, was in effect his own act. We approve the rule of the California case, and it follows that, whether the case at bar be viewed as one where the master had

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actually furnished proper appliances or whether it had neglected to do so, there were questions of negligence under the evidence, which should have been submitted to the jury.

Respondent insists that the evidence shows contributory negligence on the part of appellant as the proximate cause of his injury, and that it should be held as a matter of law that he is not entitled to recover. It is claimed that the cable had six or seven feet of slack at the time he started the engine, which appellant knew and saw; that he started with the hard pull, which caused a sudden strain upon the cable when the slack was drawn in. It is insisted that the usual manner of starting was first slowly to draw in the slack, and then begin the hard pull. It is also insisted that the appellant contributed to his injury because he knew of the use of the small swamp hook, and did not object to it. These questions of contributory negligence we think under the evidence are such as should be submitted to the jury, and that it should not now be determined as a matter of law that appellant is not entitled to recover because of his own negligence. There is evidence to the effect that the hook which was used was insufficient to have withstood any kind of hard pull upon as heavy a weight as the tank, without regard to the manner of starting, and that no signal for any kind of start should have been given. Appellant also denies that he knew that the small swamp hook was being used.

Since, for the reasons above given, the case must be reversed, we do not deem it necessary to discuss other alleged errors. Doubtless before another trial appellant's application to amend his complaint in certain particulars asked will be granted. The refusal at the time of the trial was based upon the ground that it came too late, and was a surprise to respondent.

Appellant moves this court to reverse the judgment of nonsuit and dismissal, and for an order directing the lower court to proceed to trial merely to determine the amount of damages. The motion is based upon the alleged ground that the evidence conclusively shows negligence on the part of respondent as the proximate cause of the injury. The motion, in so far as it asks for an order directing a trial to fix the amount of damages only, is denied. The questions of negligence and contributory negligence should all be submitted to a jury. In that manner only can a jury intelligently fix the amount of appellant's damages, if he is entitled to recover.

The judgment is reversed, and the cause remanded with instructions to the lower court to retry it.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4670. Decided July 23, 1903.]

ALLIE HOBERT, *Respondent*, v. CITY OF SEATTLE, *Appellant*.

NEGLIGENCE — DEFECTIVE STREETS — CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries received by falling into an unguarded trench in the street, the plaintiff is guilty of contributory negligence as a matter of law, where it appears that she knew the location of the trench, that it was wide and deep, with slippery banks, that she had jumped across it the same afternoon, and was injured in attempting to re-cross it after dark without the aid of lights.

SAME — SPECIAL VERDICT.

In such a case, a special verdict finding the above facts, and that the plaintiff knew it was dangerous to attempt to cross on account of the darkness and slippery banks, is in conflict with and controls a general verdict for the plaintiff, and it is error to refuse the defendant judgment thereon.

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Argument of Counsel.

Appeal from Superior Court, King County.—Hon. GEORGE E. MORRIS, Judge. Reversed.

Mitchell Gilliam, William Parmerlee, John E. Humphries and Harrison Bostwick, for appellant.

P. D. Hughes and Andrew Balliet, for respondent:

The contributory negligence of the plaintiff was entirely a question for the jury. *Mischke v. Seattle*, 26 Wash. 617; *Jordan v. Seattle*, 26 Wash. 61; *McQuillan v. Seattle*, 10 Wash. 464; *Drake v. Seattle*, 30 Wash. 81 (70 Pac. 231); *Rowe v. Ballard*, 19 Wash. 1; *Prather v. Spokane*, 29 Wash. 549 (70 Pac. 55).

Knowledge of a defect in a street does not *per se* establish contributory negligence. *Jordan v. Seattle*, 26 Wash. 61; *Village of Clayton v. Brooks*, 150 Ill. 105; *Samples v. Atlanta*, 95 Ga. 110; *Sias v. Village of Reed City*, 103 Mich. 312; *Lowell v. Township of Watertown*, 58 Mich. 568; *Kelley v. Town of Fond du Lac*, 31 Wis. 179; *Nichols v. Town of Laurence*, 96 Iowa, 388; *Evans v. Utica*, 69 N. Y. 166; *Millcreek Township v. Perry*, 12 Atl. 149.

Knowledge of a defect does not make one guilty of contributory negligence as long as reasonable care is used. *McQuillan v. Seattle*, 10 Wash. 464; *Drake v. Seattle*, 30 Wash. 81 (70 Pac. 231); *Rowe v. Ballard*, 19 Wash. 1; *Jordan v. Seattle*, *supra*.

It does not, as a matter of law, preclude recovery. *Bothell v. Seattle*, 17 Wash. 263; *Smith v. Spokane*, 16 Wash. 403; *Cowie v. Seattle*, 22 Wash. 659; *Sherman & Redfield*, Negligence (5th ed.), 376; *Maloy v. St. Paul*, 54 Minn. 398; *Wichita v. Coggshall*, 3 Kan. App. 540; *Germaine v. Muskegon*, 105 Mich. 213; *Village of Clayton v. Brooks*, 150 Ill. 97; *Jones*, Negligence of Municipal Corporations, p. 426.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondent against appellant, the city of Seattle, to recover damages for injuries alleged to have been received through the negligence of appellant. The negligence charged is that of permitting a trench to be uncovered, unguarded, and without lights or signals of danger on that part of Twenty-fourth avenue where the same intersects with East Howell street in said city. It is alleged that the trench was about eight feet in depth, three feet in width, and that it extended many yards north and south on said Twenty-fourth avenue. Respondent fell into this trench after dark on the evening of January 1, 1902. Contributory negligence is charged by the answer. The cause was tried before a jury, and a verdict was returned in favor of respondent in the sum of \$1,750. Certain interrogatories were submitted to the jury by appellant, and answers to these interrogatories were returned with the general verdict. Appellant moved for a new trial, which was overruled, and thereupon it moved for judgment upon the interrogatories and answers thereto, notwithstanding the general verdict. The latter motion was also denied, and judgment was then entered for respondent in the amount specified in the general verdict. The city has appealed from the judgment.

We will discuss only the error assigned upon the refusal of the court to grant appellant's motion for judgment notwithstanding the general verdict. The evidence of respondent disclosed that she had, in company with her young son, passed over this trench during daylight of the afternoon of the same day on which she received her injuries. She was thus apprised of its existence, location, and surroundings. After crossing the ditch, she and

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her son went on, and after spending some time at the house of an acquaintance, they returned, after the darkness of night had come on; and, while attempting to cross the trench, respondent fell in it, and was injured. The following special findings in answer to interrogatories were returned by the jury:

"1. At the time the plaintiff attempted to cross the ditch, where she received the injury, did she know there was a dangerous ditch in the street, near five feet deep and thirty inches wide, with a slippery bank? Ans. Yes.

"2. Had the plaintiff jumped over the ditch on the afternoon previous to her injury, and did she know of its dangerous character when she jumped it? Ans. Yes.

"3. Were there any lights or guards on the ditch at the time and place plaintiff received her injury? Ans. No.

"4. If there had been lights at the place where the plaintiff fell into the ditch, could plaintiff have avoided the injury? Ans. Yes.

"5. Did plaintiff voluntarily, in the night time, without any light in the darkness, attempt to cross the dangerous ditch which she knew was there? Ans. Yes.

"6. Was the plaintiff feeling her way with her feet, and trying to discover the exact location of the ditch, at the time she fell into the same? Ans. Yes.

"7. Did the plaintiff know the ditch was in the street, and that it was dangerous, on account of the darkness and slippery banks, to cross the same without any light? Ans. Yes.

"8. Could the plaintiff, by the use of ordinary care, have secured lights before crossing the ditch? Ans. We do not know.

"9. Could plaintiff have avoided the injury by the use of ordinary care in securing lights before crossing the ditch? Ans. Yes.

"10. Was the street and place of injury unimproved, and did plaintiff know the fact? Ans. Yes.

"11. Did the plaintiff know before she attempted to

cross the ditch that the defendant had negligently failed to have its lights upon the ditch? Ans. We do not know."

We think the above special findings were inconsistent with the general verdict, and that by reason thereof respondent was not entitled to recover. It is established by the findings that respondent knew of the location and character of the ditch which she was attempting to cross in the darkness of night. If by the exercise of ordinary diligence on her part she could have avoided the injury, she is not entitled to recover, notwithstanding the duty of the city to keep its streets in reasonably safe condition for persons to pass thereon in safety by night as well as by day. *Massey v. Mayor, etc., of Columbus*, 75 Ga. 658. Conditions almost parallel with those in the case at bar were under consideration in the case of *Sheats v. Rome*, 92 Ga. 535 (17 S. E. 922). The plaintiff in that case knew of the existence of an open ditch. The petition in the case stated that "at a late hour" the plaintiff started from her home to that of a neighbor. It is not stated that she started after darkness had come on, but, presumably from the words used, she did. She tried to jump over the ditch where it crossed the sidewalk, and fell in. The trial court dismissed the cause on the ground that the petition "set forth no sufficient cause of action." The supreme court simply affirmed the judgment without argument, but the syllabus of the case (prepared by the court) states, in substance, that, although it was gross negligence for the municipal authorities to leave the ditch as it was, yet a female who was aware of its existence, width, and depth, and who attempted to cross it, had no right of action against the city, for the reason that by the exercise of ordinary care on her part the injury might have been avoided. In *Casey v. Fitchburg*, 162 Mass. 321 (38 N.

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E. 499), a similar state of facts was involved, and it was held that the plaintiff could not recover. To the same effect are *McCabe v. Buffalo*, 18 N. Y. Supp. 389; *Hesser v. Grafton*, 33 W. Va. 548 (11 S. E. 211); *Bruker v. Town of Covington*, 69 Ind. 33 (35 Am. Rep. 202); *Indianapolis v. Cook*, 99 Ind. 10. In the last named case it was held that, under the showing as to contributory negligence, the defendant was entitled to a judgment notwithstanding an adverse general verdict. Many cases are cited by appellant which bear directly upon the principle here involved, but the cases we have cited seem to be more directly in point on the facts. Respondent insists that the case of *Jordan v. Seattle*, 26 Wash. 61 (66 Pac. 114) is decisive of the case at bar in her favor. In that case a hole existed in the sidewalk, of which the plaintiff knew. She was attempting to pass over it in the night time when she fell and was injured. It was held that the question of contributory negligence was for the jury. It will be observed from that opinion that the case was regarded as one where the danger was not shown to have been of such a character as that no person in the exercise of ordinary prudence would have incurred the risk of injury. The walk was used daily before the accident. The evidence did not disclose the size and nature of the hole, further than that a plank was broken. There was no evidence as to the width of the sidewalk, or as to whether the plaintiff could with safety have passed to the right or the left of the hole, or have stepped over it. It was held that the fact that the walk was used daily, that others passed over it without injury, and that it was left open to the public by the city, tended to show that the hole in the walk and the walk at that place could, with ordinary care, have been passed over in safety, and that the danger was slight. It

seems to us clear that the above case should be distinguished from the one at bar. The conditions and surroundings here were altogether different. The facts as to respondent's contributory negligence were submitted to the jury, and they found what those facts were. It cannot be said, under the facts as found, that the danger was slight. The character of the known environment must largely be considered, in order to determine the nature of the ordinary care required.

The supreme court of Indiana, in *Bedford v. Neal*, 143 Ind. 425, 429 (41 N. E. 1029) observed that "ordinary care, however, is a relative term. What would be ordinary care under one set of circumstances might be gross negligence under a different set of circumstances." In view of the above stated rule, which, it seems to us, appeals directly to ordinary reasoning as just and right, we think it cannot be said here that the findings of the jury show that respondent exercised ordinary care under the unusually dangerous conditions that surrounded her. She says that when she crossed the trench in the afternoon she could not step over it, but that she leaped over it. Considering the clothing ordinarily worn by a woman, involved as it would be in leaping over such a dangerous place, together with the darkness of the night, the wide and deep trench, the slippery condition of the ground from recent rains and from the storm then around her, we think it must be said, as a matter of law, that respondent did not exercise ordinary care in the premises, and that she cannot, therefore, recover. It follows that the motion of appellant for judgment upon the interrogatories and answers thereto, notwithstanding the general verdict, should have been granted.

The judgment is therefore reversed, and the cause re-

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manded, with instructions to the lower court to grant the motion and enter judgment accordingly.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4688. Decided July 24, 1903.]

F. W. WUSTHOFF *et ux.*, *Appellants*, v. ALICE SCHWARTZ,
Respondent.

LANDLORD AND TENANT — EVICTION — DAMAGES.

Actual force is not necessary to effect an eviction, but any interference with the tenant's beneficial enjoyment is sufficient.

SAME — ESTOPPEL.

Where the landlord commenced to make repairs about the middle of May, the tenants making no objection, and paying rent in advance on June first for one month, and where the repairs continued during the month of June, becoming more and more troublesome, until the entire basement was torn up, the porches became dangerous, the back entrance was nailed up and the front steps were about to be torn down, which would have effectually prevented all passing to and from the house, at which time (June 17) the tenants moved out, the landlord was guilty of an eviction, and neither the silence of the tenants, nor the payment of rent for June after the commencement of the repairs would estop them from claiming the damages suffered by the eviction.

SAME — AGENCY — LIABILITY FOR ACTS OF AGENT.

Upon an eviction by the making of repairs, interfering with the tenants' quiet enjoyment of the premises, the landlord is not relieved from liability by the fact that the work was done by contractors who had been instructed not to proceed until the tenants had given consent, as they were agents of the landlord, and he was liable for their acts done within the apparent scope of their authority.

Appeal from Superior Court, King County.—Hon.
GEORGE MEADE EMORY, Judge. Reversed.

Fred H. Peterson, for appellants.

Robert F. Booth and Root, Palmer & Brown, for respondents:

Appellants are estopped by their silence from complaining, or denying that they consented to the repairs. 1 *Herman, Estoppel*, p. 6; *Bigelow, Estoppel* (4th ed.), p. 546; *Bishop, Contracts* (Enlarged ed.) § 1299; *Doe v. Allen*, 3 Taunt. 78, 80; *Pickard v. Sears*, 6 Ad. & E. 469; *Freeman v. Cooke*, 2 Exch. 654; *Stevens v. Dennett*, 51 N. H. 331-6; *Blair v. Wait*, 69 N. Y. 116; *Doe v. Pye*, 1 Esp. 366; *Patton v. Barnett*, 12 Wash. 576; *Lynch v. Richter*, 10 Wash. 487; *Roeder v. Fouts*, 5 Wash. 135; *Gregg v. Von Phul*, 1 Wall. 174-282 (17 L. ed. 536).

The opinion of the court was delivered by

HADLEY, J.—Appellants brought this action to recover damages by reason of an alleged eviction from a tenement occupied by them as tenants under respondent. The complaint alleges that appellants paid the rent for the premises each month in advance, and that the same was paid, including the whole of the month of June, 1901; that at divers times between May 10, 1901, and June 17 of the same year the respondent, without permission or consent of appellants, wilfully and without cause wrongfully entered upon said premises, and proceeded to tear down portions of the building by taking away the stairway in the rear thereof and by taking out the toilets and water pipes, thus making the premises entirely useless and unsanitary for dwelling purposes; that she caused the house to be raised, tore off the front steps, and disconnected the sink, thereby rendering the building not only useless as a dwelling, but also dangerous to health; that by reason thereof the appellant Anna Wusthoff became seriously ill

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from sewer gas and from the unsanitary condition of the building; that appellants were evicted from the premises by reason of said acts of respondent, and, on June 17, 1901, were forced to leave said house, and find another dwelling place. The expense of moving, of the sickness of said Anna Wusthoff, and the higher rent required to be paid for another dwelling place are alleged as items of damage. The answer avers that about May 10, 1901, respondent notified appellants that she desired to make certain repairs upon the premises, and that they gave their free and full consent that she might enter thereon for said purpose; that, acting under such permit, she did enter thereon and made the repairs, but that in so doing she did not make said building unsanitary or dangerous. The cause was tried before a jury, and, when the appellants' evidence had all been introduced, respondent challenged the sufficiency of the evidence, and moved for a judgment in her favor. The motion was granted. In ruling upon the motion the court said, in substance, that although, under the testimony, it clearly appeared that damages had been shown, yet it also equally clearly appeared that whatever acts were done by respondent were done with the constructive consent and acquiescence of appellants. Judgment was entered dismissing appellants' action, and they have appealed therefrom.

Several alleged errors are assigned, but we will discuss only the assignment that the court erred in granting the motion to withdraw the case from the jury and in entering judgment for respondent. The testimony, as it stood, showed that the acts which it is claimed amounted to an eviction commenced on May 13, on which date the water closets and sewer pipe were taken out of the house. On June 3, the whole basement was

torn up, including the floor. Appellants were required to move their coal, wood, and tools, and some of these they were compelled to store in the kitchen upstairs. On June 4 the railing was torn from the front porch, which made it dangerous for the children of the family. The porch was four or five feet above the ground, and the family consisted of ten persons, the two appellants and their children, eight in number. On June 11 the entrance stairway at the rear of the house, consisting of eighteen steps and three platforms, was torn down, and the rear door was nailed fast, thus preventing ingress and egress from the rear. On June 15 preparations were made to tear down the front steps, the removal of which would have effectually prevented all passing to and from the house. Appellant Anna Wusthoff says she then begged the carpenter to leave the steps, and told him they would move out on June 17 if they could get another house, and if not her husband would buy a tent. The steps were then left undisturbed, and on June 17 appellants moved out of the house. After the closets were torn out, respondent's agent attempted to get appellants' written consent that the repairs might be made. This was refused. Appellants testified that they never gave permission to any one to do any of the acts above stated. They appear to have said nothing by way of consent or of objection or remonstrance, but quietly endured what was going on until the front steps were about to be removed. The rent was fully paid for the entire month of June.

It would seem that, if an eviction can be effected without the use of actual expulsive force, the above facts were sufficient to constitute such an eviction. It is a well established rule that actual force is not necessary

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to effect an eviction in law, but that any interference by the landlord with the full and substantial enjoyment by the tenant of the thing leased amounts to an eviction. In *Hoeverler v. Fleming*, 91 Pa. St. 322, the court observed:

“The modern doctrine as to what constitutes an eviction is, that actual physical expulsion is not necessary, but any interference with the tenant's beneficial enjoyment of the demised premises will amount to an eviction in law.”

In *Edmison v. Lowry*, 3 S. D. 77 (52 N. W. 583, 17 L. R. A. 275, 44 Am. St. Rep. 774), the following instruction was approved:

“As to the matter of eviction. It is not necessary there should be any act of a permanent character, but any act which has the effect of depriving a tenant of the free enjoyment of the premises, or any part thereof, or any appurtenances pertaining to these premises, must be treated as an eviction; and I charge you that any act of the plaintiffs which has deprived the defendant of the enjoyment of the free right pertaining to and belonging to him as tenant may be treated as an eviction.”

To the same effect see the following: *Coulter v. Norton*, 100 Mich. 389 (59 N. W. 163, 43 Am. St. Rep. 458); *Dyett v. Pendleton*, 8 Cow. 727; *West Side Savings Bank v. Newton*, 76 N. Y. 616; *Jackson v. Eddy*, 12 Mo. 209; *Skally v. Shute*, 132 Mass. 367; 3 Sutherland, Damages (2d ed.) § 848.

Under the rule followed by the above authorities the acts of the respondent amounted to an eviction unless those acts were waived by the consent of the appellants. There was no evidence whatever that appellants gave such consent, unless their silence shall be held to have amounted to consent. We do not think it should be so held. They may have patiently endured the first acts

of respondent not expecting a continuance of similar interruptions. These interruptions continued, however, during the remainder of the month of May. It is argued that, since they afterwards paid the rent for another rental period, namely, for the month of June, that they thereby waived the interruptions, and consented thereto. Whatever may be said of the effect of the payment of rent in its application to what was done before that time, the same argument cannot be applied to the conditions which followed in the month of June. It is not improbable that appellants may have hoped for a cessation of the troublesome interruptions from the beginning of the month of June, and that month stood alone as an independent rental period, which they had a right to regard as in no way connected with the period covered by the month of May. Having paid their rent, they at least had the right to expect peaceful and quiet enjoyment of the premises to the end of that period. But, as we have seen, they were not permitted to have such enjoyment. Acts were done by the landlord during the month of June that were wholly inconsistent with quiet enjoyment by the tenants, and these were continued until they could be no longer endured, when, with further threatened acts that would have rendered the building practically uninhabitable, appellants were compelled to leave it. As we view these conditions they clearly amounted to an eviction.

Ralph v. Lomer, 3 Wash. 401 (28 Pac. 760), is not inconsistent with the above conclusion. There the action was brought by the landlord to recover possession for non-payment of rent. As one defense the tenant set up a series of alleged acts of the landlord which covered a period of some months, during all of which time the

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tenant had paid the rent and remained in possession. He was still in possession when the cause was tried, and was endeavoring to keep his landlord out. It was held that, since he had paid the rent for each month covered by the acts complained of, and retained possession up to the time of the initiation of the action, he thereby waived any claim for damages, and that he had not been constructively evicted. In the case at bar, however, while it is true appellants had paid the rent in advance for the month of June, yet during that month the further acts of the landlord were such that they were forced to leave the premises, were actually evicted, and they did not therefore waive damages.

Respondent further insists that it appears that the work was to be done by contractors, and that they were instructed by her not to begin it until appellants had consented; that, if they did not get such consent, they alone are responsible, and that she cannot be held liable for their misconduct. The contractors were, in any event, the agents of respondent, and as such were authorized to do the work. There is no evidence that appellants had notice that the contractors had disregarded respondent's instructions. The agents were sent to the premises to do the very things which they did. They were done within the apparent scope of their authority, and in the absence of any notice to appellants as to the extent thereof. The acts therefore became, as to these appellants, those of the principal. Respondent had accepted rent from appellants, which involved a covenant on her part for the quiet enjoyment of the premises. The duty therefore rested upon her to see that consent was given before she gave even qualified authority to her agents to enter upon the premises.

The judgment is reversed and the cause remanded, with instructions to the lower court to deny the motion of respondent for judgment, and to retry the cause.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR JJ., concur.

[No. 4621. Decided July 27, 1903.]

HUGH A. TAIT, as *Receiver of the Bay Lumber & Shingle Company, Appellant*, v. WILLIAM PIGOTT, *Respondent*.

CORPORATIONS — CAPITAL STOCK — REDUCTION — PURCHASE FROM STOCKHOLDER.

A complaint by the receiver of a corporation alleging that the defendant, a stockholder, sold his stock to the corporation and received \$834.50 therefor out of its assets, that the corporation thereby attempted to reduce its capital stock contrary to the law, and that the corporation is now insolvent, and has no assets to pay its creditors, states a cause of action against the stockholder, under Bal. Code, § 4265, providing that it is unlawful to pay any part of the capital stock to the stockholders.

SAME.

It is immaterial that the corporation was solvent at the time of the purchase, if it has since become insolvent.

SAME.

The capital stock of a corporation is a trust fund for the payment of its debts, upon the faith of which the law presumes credit to have been given.

Appeal from Superior Court, King County.—Hon. GEORGE E. MORRIS, Judge. Reversed.

Byers & Byers, for appellant.

Ballinger, Ronald & Battle and *Ira Bronson*, for respondent.

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The opinion of the court was delivered by

HADLEY, J.—Appellant, as receiver of the Bay Lumber and Shingle Company, a corporation organized under the laws of Washington, brought this action against respondent. The second amended complaint in substance avers that on November 26, 1899, the respondent was both a stockholder and trustee in said corporation, and that on said date he sold his stock in the company to the company itself, and received therefor from the corporation, out of its assets, the sum of \$834.50; that the corporation thereby attempted to reduce its capital stock, contrary to law; that at said time the corporation was indebted to divers persons, which indebtedness has not yet been paid, and claims therefor have been presented to appellant as receiver; that the purchase of said stock was to the prejudice of the creditors of the corporation, in that the creditors have not been paid; that the corporation was insolvent at the time this action was commenced, and the receiver has now no funds in his hands with which to pay its debts. Judgment is demanded against respondent in the sum he received from the corporation for his stock. Respondent demurred generally to the second amended complaint, and the demurrer was sustained. Appellant elected to stand upon said pleading, and refused to plead further. Whereupon the court entered judgment that appellant shall take nothing by his action, and that respondent shall recover costs. This appeal is from said judgment.

The only error assigned is that the court sustained the demurrer and entered judgment against appellant. Respondent insists that the complaint does not allege that the money which was paid him for his stock was a part of the capital stock, and that no allegation nega-

tives the fact that the payment may have been made from the surplus earnings. The averment, in exact words, is: "He sold his stock in said company to the company, and received therefor from the company out of its assets the sum of \$834.50, and the said corporation thereby attempted to reduce its capital stock contrary to law." Respondent urges that the allegation does not state that the capital stock was reduced, but that only an attempt was made to reduce it. The allegation goes further, and says that the corporation did a certain thing; in other words, completed an act, and thereby attempted to reduce its capital stock. The averment is in effect the equivalent of saying that the corporation intended by what it did to reduce the capital stock, but that what was so intended amounted only to an attempt, because it was contrary to law. Sections 4271, 4272 and 4273, Bal. Code, provide a method by which corporations may diminish their capital stock. The method alleged in the complaint is not the one provided by statute, and therefore, as alleged, was no more than an attempt to reduce the capital stock. But although it was, in law, only an attempt, yet a certain thing was accomplished. The corporation parted with its money and the respondent has it. Shall the accomplished act which was intended to reduce the capital stock be permitted to stand, as against the rights of creditors, notwithstanding the fact that it was contrary to law? Since the complaint alleges in effect that by the purchase of respondent's stock the corporation intended to reduce its capital stock, it follows that the stock was purchased with the intention of cancelling and retiring it, and that it was not intended to re-issue it to other stockholders. The result was a reduction of the amount of the capital stock funds in the

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hands of the corporation by the payment of a portion thereof to a stockholder. Such a result is directly contrary to the provisions of § 4265, Bal. Code, which make it unlawful to "in any way pay to the stockholders, or any of them, any part of the capital stock of the company." It is alleged that creditors held indebtedness against the corporation at the time respondent was paid this money, that the claims are still unpaid, and that the holding of such money by respondent is to their prejudice, since the corporation is now insolvent. It is not alleged that the company was insolvent at the time the transaction occurred, but we think that is immaterial, since the thing which was unlawfully done reduced the available resources of a now insolvent company, and, if such reduction had not been made, the amount thereof should now be on hand for the benefit of creditors.

In *Barto v. Nix*, 15 Wash. 563 (46 Pac. 1033); a bank accepted the stock of a stockholder in payment of his indebtedness to the bank. It appears that this was done in order to protect the bank from loss, and that it was the intention to re-issue the stock. This court upheld the transaction on the ground that it was a *bona fide* one for the purpose of protecting the corporation from loss. But the stock was re-issued to other stockholders, and no reduction of the capital stock resulted from the transaction. The court observed in that case, at pages 568 and 569, that:

"It may be conceded that a corporation in this state cannot traffic in its own stock. Such we believe to be the rule established in all the states having similar statutory provisions. But it does not follow that it may not receive such stock in payment of the indebtedness of one of its stockholders, when such transaction is *bona fide* and for the purpose of protecting the corporation from loss."

No such conditions as existed in *Barto v. Nix, supra*, are shown by the complaint in the case at bar. Respondent was not indebted to the corporation, but he received cash for the surrender of his stock; and, as we have seen, the effect of the allegations is such that the corporation did not receive the stock, intending to re-issue it on the payment of cash or the delivery of obligations equivalent thereto by other stockholders. The capital stock of a corporation is a trust fund for the payment of its debts, upon the faith of which the law presumes the credit was given, unless other security was taken at the time by the creditor. *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98 (2 Am. Rep. 563); *Wood v. Dummer*, 3 Mason, 308; *Sanger v. Upton*, 91 U. S. 56; *Clapp v. Peterson*, 104 Ill. 26. In the last named case it was held that in Illinois a corporation may purchase its own stock in exchange for money or other property of equal value, and may hold, re-issue, or retire the same, if it is done in good faith, and if the corporation is not insolvent or in process of dissolution, or if the rights of creditors are not affected thereby. No element of bad faith was involved, but it was held that, inasmuch as the purchase by the corporation of the stock in question injuriously affected the interests of creditors, it could not be upheld. To the same effect is *Hall v. Henderson*, 126 Ala. 449 (28 South. 531, 85 Am. St. Rep. 53), where it was also held that it was immaterial whether the corporation was insolvent or not at the time it purchased the stock, since the payment to the stockholder was in effect a gift by the corporation which impaired its ability to pay its debts, and was fraudulent as to creditors. See, also, *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. 392. The complaint in the case at bar alleges that the rights of credi-

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tors were injuriously affected, and further facts alleged show that such was the case within the rule of the above authorities. For all the reasons hereinbefore stated, we think the complaint stated such a case as requires respondent to return to the corporation the money he received from it, that it may be available for the benefit of creditors.

It follows that the demurrer should have been overruled. The judgment is reversed and the cause remanded, with instructions to the lower court to overrule the demurrer.

FULLERTON, C. J., and ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4691. Decided July 28, 1903.]

W. D. IRWIN, *Appellant*, v. GREENVILLE HOLBROOK, *Respondent*.

STATUTE OF LIMITATIONS — PLEADING — INCONSISTENT DEFENSES.

A denial of a cause of action arising out of a trust relation and the receipt of money from the sale of land is not inconsistent with a plea of the statute of limitations, setting up a repudiation of any trust relation more than three years prior to the commencement of the action, as both allegations may be wholly true.

TRUSTS — FRAUD — STATUTE OF LIMITATIONS — LACHES.

Where lands were conveyed in 1885 to a surety, as trustee to sell and pay a debt of \$1,100, and after selling nearly all the land in 1890 there was a large surplus in the hands of the trustee, who fraudulently represented that there was a balance still due him of \$600 after the sale of all the land (which had cost \$2,200), and a settlement was then made whereby the owner gave the trustee a note for \$500 for such supposed balance, and the fraud was discovered in 1897 by learning of an indorsement on the note of \$450 on account of land sales, and

by an inspection of the public records, disclosing deeds nearly all filed prior to the settlement, and all filed prior to 1892, and the owner knew that the sales were being made from 1885 to 1890, and lived in the town where the sales were made practically all the time, and had easy access to the records, and was a man of ordinary intelligence, holding responsible public office, he is guilty of such negligence in not discovering the fraud for more than six years after the repudiation of the trust relation that he will be held to have discovered it more than three years before the action was begun, and the same is barred by the statute of limitations.

Appeal from Superior Court, Whitman County.—Hon. CHESTER F. MILLER, Judge. Affirmed.

Thomas Neill and *A. A. Wilson*, for appellant.

John Pattison, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is the second appeal in this cause. On the former appeal a judgment dismissing the cause upon the ground that it appeared upon the face of the complaint that the action was barred by the statute of limitations was reversed, and the cause remanded for further proceedings. *Irwin v. Holbrook*, 26 Wash. 89 (66 Pac. 116). The amended complaint alleges, in substance, that on February 21, 1885, plaintiff was the owner of certain real estate; that on said date the plaintiff conveyed this real estate to defendant pursuant to an agreement to sell the property, and out of the proceeds to pay certain indebtedness of plaintiff, and thereupon to account to and pay to plaintiff any surplus remaining after the payment of said debts; that defendant sold said property for a sum larger than the amount of the debts, but refused to account for or pay to plaintiff the said surplus, or any part thereof. On or about the

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1st day of June, 1898, plaintiff demanded an accounting, which was refused. The complaint was filed on October 1, 1898. A more complete statement of the allegations of the complaint will be found in the opinion in *Irwin v. Holbrook, supra*. To this complaint the defendant answered, denying all the allegations thereof except the ownership of the land by plaintiff on February 21, 1885, and also an allegation that at said date there was a mortgage thereon of \$300. As a first affirmative defense the defendant alleged, in substance, that on the 21st day of February, 1885, he purchased from plaintiff the land described in the complaint, and paid therefor the sum of \$800 in cash, and assumed a mortgage of \$300, with interest, against the land; that thereafter plaintiff had no further interest in said lands or the proceeds thereof. For a second affirmative defense, defendant alleges, in substance, the purchase of the land, as in the first affirmative defense; that defendant sold said lands between February 28, 1885, and December, 1891, to divers persons, and that deeds for all of the land sold were placed of record in the auditor's office of Whitman county prior to January 1, 1892, more than three year's prior to the commencement of this action; that plaintiff had notice more than three years prior to the commencement of the action that all of said real estate had been sold by defendant; that he acquired said notice prior to the first day of January, 1892; that he did not commence this action within three years after said notice; and that the action is barred by the statute of limitations. To these affirmative answers plaintiff demurred on the ground that none of them stated facts sufficient to constitute a defense to the cause of action stated in the complaint. These demurrers were overruled by the court. Plaintiff

then replied, denying each of the allegations contained in the affirmative defenses. On the issues thus formed a trial was had before the court. At the close of plaintiff's evidence the court found, among other things, "that the plaintiff did not commence his action within the time limited by law, and that plaintiff's cause of action, if any he had, is barred by the statute of limitations," and thereupon dismissed the action. Plaintiff appeals, alleging that the court erred (1) in overruling the demurrer to the second affirmative defense; and (2) in all the findings made. Under the view we have taken of the case, it will be necessary for us to discuss only the first alleged error, and also the finding of fact that the action is barred by the statute of limitations.

1. In support of the demurrer, appellant argues that the plea of the statute of limitations is in the nature of confession and avoidance, and, since the answer contains a denial of the cause of action, the plea of the statute of limitations is inconsistent with the denial of the cause of action. In the case of *Seattle National Bank v. Carter*, 13 Wash. 281 (43 Pac. 331, 48 L. R. A. 177), this court, in an exhaustive review of the authorities, came to the conclusion "that, however diversified the answers may be, they must all contain the essential element of truth, and if the admission of the truth of one answer necessarily proves the falsity of another, they cannot be allowed to stand." In *Davis v. Seattle National Bank*, 19 Wash. 65 (52 Pac. 526), this court said:

"We are of the opinion that a defendant may deny liability, and at the same time set up a counterclaim or offset, or allege payment, in all cases where there is no direct contradiction in the special facts pleaded."

Defenses are inconsistent only when one in fact contradicts the other. Where there is only a seeming and logical

inconsistency, which arises merely from a denial and the plea in confession and avoidance, such defenses are not held to be inconsistent. Bliss, Code Pleading (3d ed.), § 343; *Willson v. Cleaveland*, 30 Cal. 192; *Lawrence v. Peck*, 3 S. D. 645 (54 N. W. 808). So long as different defenses are consistent with the truth, they may be pleaded. If two or more defenses may be true, they cannot be said to be inconsistent. Defenses are inconsistent where the proof of one necessarily disproves the other, or where if one be true the other cannot be. In this case the defendant denies any trust relation to plaintiff. He then pleads as one separate defense, in substance, that he purchased the land outright from plaintiff, and that since the time of this purchase plaintiff has had no interest therein or in the proceeds thereof. He then pleads that plaintiff had notice long prior to the bringing of the action that defendant claimed the land and proceeds, and that the time within which plaintiff might have maintained this action had long since expired. All of these allegations may be wholly true. There is therefore no such inconsistency as would prevent the defendant from pleading them, and the demurrers were for that reason properly overruled.

2. The evidence upon the question whether or not the action is barred is the evidence of the appellant himself, and is substantially as follows: He purchased the land about the year 1884 for \$2,200. He deeded the land to the respondent in February, 1885. Respondent then agreed to take the land, sell it, and pay certain debts owing by plaintiff to third persons, and also to pay the appellant whatever remained. Appellant at this time was living at Pullman, in Whitman county. The land adjoined the town of Pullman. Respondent had the land platted

into town lots, and sold all the lots. The deeds therefor were placed of record in Whitman county before December, 1891. Appellant lived in Whitman county all the time from 1885 to October 1, 1898, when the action was begun, except about fifteen months, during the years 1887 and 1888, when he was in Idaho, and except about a year, from the spring of 1894 to the spring of 1895, when he was in the state of California. During all the time from 1885 to 1890 he knew respondent was trying to sell the land, and was selling it. On October 13, 1890, appellant called upon respondent for a settlement, and respondent thereupon told him that the land had all been sold, but that the expenses of platting, taxes, and selling the land had been so great that the proceeds were not sufficient to meet these expenses and the note and mortgage assumed by respondent, by about \$600. At that time respondent agreed to take appellant's note for \$500, due in two years, in settlement of the whole matter. Appellant consented thereto, and executed and delivered his note to respondent for that amount. This note was not paid at maturity, and appellant and respondent had no further talk about the matter until the fall of 1897. In 1893 respondent indorsed on the note the following: "Sept. 1, 1893. Cr. on the within \$450 on real estate at Pullman. This closes all real estate acct." In the fall of 1897 appellant called upon respondent, and what occurred at this meeting is related by appellant as follows: "He wanted me to renew this note—this \$500 note that I gave in 1890; and I told him, all right, I would renew it; and we went into his office to renew this note, and he got it out and on the back of it was this credit of \$450, and on it was written 'Cr. on the within \$450 on real estate in Pullman. This closes all real

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estate acct.' So I says to him, 'You told me at the time I signed the note that the land was all sold, and did not bring enough, by \$500, to pay \$800 and the \$300,' and I says, 'Here, now, you credit me with that.' Then he commenced to explain to me that part of the land he had sold on time, and this \$450 was some he had collected since the note was given, which he had given up as lost. . . . I began to think then that he was lying about the whole transaction, and I positively refused to sign it." Appellant thereafter examined the record of the real estate transfers, and found that the consideration expressed in the recorded deeds made by defendant for the lots sold was a large amount in excess of the \$1,100 which was to be paid on account of the debts. Appellant then made a demand for another accounting, which demand was refused.

Assuming that the evidence of the plaintiff was properly received, and assuming that it conclusively proves that the respondent received the lands and proceeds thereof for the benefit of the appellant, and that there was a large surplus remaining in respondent's hands on October 13, 1890, when the settlement was had, the trust relation was clearly repudiated at that time by the respondent; the appellant acquiesced therein and agreed thereto, and gave respondent his note for \$500 in payment of an agreed deficiency. In making this settlement, appellant relied upon the statement of respondent that the proceeds of sales had not been sufficient to reimburse respondent for money expended. This statement was false and fraudulently made. Appellant did not actually discover the fraud until August, 1897, and then the discovery was made by an examination of a public record which disclosed the amount of money received by re-

spondent. This record was open to appellant at all times, and the facts contained therein had been open to appellant for at least six years. When the cause was heard on a former appeal, we held that the complaint was "sufficient when it contained a direct and positive statement of the time of the discovery of the fraud, without further negating the idea that the fraud might have been discovered sooner; leaving it rather a rule of evidence than a rule of pleading, if it still be the rule that means of discovery is equivalent to actual discovery." *Irwin v. Holbrook*, *supra*; *Stearns v. Hochbrunn*, 24 Wash. 206 (64 Pac. 165).

The question now is, does the evidence show such negligence on appellant's part that the fraud, though not actually known, will be held to have been discovered more than three years before the action was begun. We think it does. Upon this question this court, in *Deering v. Holcomb*, 26 Wash. 588, at page 598 (67 Pac. 240, 561), said:

"Our statute, in effect, says that the cause of action is deemed to have accrued when the fraud is discovered. What is discovery? We answer, notice of the fraud. What is notice? This we can best answer in the language adopted by the supreme court of the United States: 'Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it. . . . The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.' . . . A party defrauded must be diligent in making inquiry. The means of knowledge are equivalent to knowledge. A clue to the fact, which, if followed up diligently would lead to a

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discovery, is in law equivalent to discovery,—equivalent to knowledge.”

In this case the evidence shows that in 1884 appellant purchased the property for \$2,200. He transferred it to respondent in 1885 to sell, and pay debts amounting to \$1,100. From 1885 to the fall of 1890 times were as prosperous in that vicinity as they had ever been. On October 3, 1890, respondent had sold all the property, and stated to the appellant that the net proceeds thereof were less than \$600. The records of the sales were then nearly all on file, and during the next year deeds for the whole thereof were on file in a public record open to appellant. The sales occurred in the same town where appellant was living during nearly all of the time. He had easy access to the record. He is shown to be a man of at least ordinary intelligence, having held responsible public office during the time of these transactions, and yet he waited for six years before making an inquiry or examination to discover the facts. Under such circumstances, we think that ordinary prudence and business judgment required appellant to open his eyes and look at the record before him to verify the statement as to the amount realized on the sales. Respondent's declaration that property of the value of \$2,200 had been sold so as to net less than \$600 was of itself sufficient to cast suspicion upon the statement, and cause an ordinarily prudent man to examine the public record which showed the amount of the selling price. Appellant's delay for a period of more than six years, it seems, ought to preclude him from now maintaining the action.

The judgment is therefore affirmed.

ANDERS, HADLEY and DUNBAR, JJ., concur.

FULLERTON, C. J., having been of counsel in the court below, did not sit in this case.

[No. 4324. Decided July 29, 1903.]

H. M. BRUMMETT, *Appellant*, v. F. L. CAMPBELL *et al.*,
Respondents.

PLEADINGS — CONCLUSIONS.

Neither conclusions or probative facts should be pleaded, but the allegation of a fact will not be affected by the addition of conclusions or redundant matter.

EQUITY — CONTRACT TO CONVEY — SPECIFIC PERFORMANCE.

Where an applicant for the purchase of school lands agrees in writing that, upon receiving a deed, he will convey a portion thereof to the owner of improvements thereon, who was to pay a proportion of the price in installments, and the contract for the purchase from the state is assigned, with notice, and the assignee receives installments of the price from the owner of the improvements, the assignee, upon obtaining a deed from the state, is bound to convey to parties who had succeeded to the interest of the owner of the improvements through the foreclosure of a mortgage thereon, upon a tender by them of the balance due under the written agreement.

SAME — EQUITABLE DEFENSE — DIRECTED VERDICT.

In an action to recover the possession of land, the plaintiff is not entitled to recover upon legal title alone, where the defendants claim the equitable title, and whether the defendants are entitled to the equitable relief demanded is a question of law for the court, and a verdict is properly directed where such defense is established.

SAME — CONTRACTS — ABROGATION.

After the owner of improvements upon school lands had mortgaged the same and his equitable interest in the lands under an agreement for the purchase of the same, he could not cancel and abrogate the agreement to the prejudice of the mortgagee, and the court was justified in disregarding unsatisfactory evidence of such attempted abrogation.

SCHOOL LANDS — IMPROVEMENTS.

The person lawfully in possession of school lands and improvements thereon has a right to retain the same until they are paid for.

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APPEAL — EVIDENCE — HARMLESS ERROR.

The erroneous admission of evidence is harmless where on the whole case a verdict was properly directed for defendants.

Appeal from Superior Court, Chehalis County.—Hon. OLIVER V. LINN, Judge. Affirmed.

J. C. Cross, for appellant.

J. A. Hutcheson, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was originally instituted by H. M. Brummett, appellant, against John Campbell and wife and Charles Merrill and wife, to recover the possession of a certain tract of land in Chehalis county, containing about four and one-eighth acres, the same being a part of lot 5, in section 36, township 18 north, of range 7 west, W. M. At or before the trial F. L. Campbell, W. D. Campbell, and Agnes Campbell were, by stipulation of parties and order of court, substituted as defendants in place of the original defendants. The record discloses that in the year 1888 one Dole was living on the land in dispute, and was the owner of valuable improvements placed thereon by himself, consisting of buildings, fences, and an orchard, and in November of that year he received from the county commissioners a lease of this and other land for a term of six years, or until the land should be sold. On April 13, 1889, Dole executed and delivered an assignment of his lease and a deed to the buildings and other improvements on the land to John C. Smith and Jacob Koontz. On March 21, 1890, Smith and Koontz, the grantees of Dole, made and delivered an assignment of this lease and a deed to said improvements to one John A. Ray. On or about October 6, 1890, the improvements on the premises covered by

this lease, and which were mostly on the land here in question, were appraised by the county commissioners, in the discharge of their duty under the law, at \$1,009.33. During March, 1891, the said Koontz was contemplating a contract with the state for the purchase of the land embraced in the lease above mentioned, and, not desiring to pay for the improvements on the land in controversy, he, on March 14, 1891, entered into a written agreement with Ray, the owner of the improvements, whereby Ray was to retain his improvements, purchase this land and pay therefor, in stated installments, such proportion of the purchase price of the entire tract included in the state's contract as this land bore to the whole tract purchased, and Koontz was to deed to Ray the land in question as soon as he should receive a deed from the state. On March 2, 1892, Koontz assigned his interest under his contract with the state to appellant Brummett, and in the written assignment appellant agreed to perform the conditions in said contract, and all subsequent agreements, and on the same day Ray and wife executed a release discharging Koontz from the obligations of his contract of March 14, 1891, and accepting Brummett in his stead, and thereafter Ray paid to appellant certain amounts due from him for this land, according to his contract with Koontz, and which had been assumed by appellant. On March 29, 1893, Ray and wife mortgaged their interest in, and improvements on, the land in question to John Campbell, one of the original defendants herein, to secure the payment of certain promissory notes. On July 3, 1896, foreclosure proceedings were instituted in the superior court for Chehalis county by the said mortgagee, John Campbell, against the mortgagors, Ray and wife, and in that action appellant, Brummett, was

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made a party defendant. The defendants, including appellant, were duly served with summons, and, having failed to appear, were subsequently adjudged in default, and a decree of foreclosure rendered against them. Execution was issued, and delivered to the sheriff, who, in obedience to the command of the writ, advertised and sold to said John Campbell "all the tenements, buildings, and improvements" on, and all the right, titled and interest of the defendants Ray in and to, the land in controversy. Pursuant to said sale the sheriff, on September 13, 1897, executed and delivered a deed to said property to the said purchaser John Campbell. Subsequently to the sheriff's sale, John Campbell took possession of the property with the consent of Ray and wife, and he and his grantees, the present ("substituted") defendants, have since remained in possession thereof, and each year have tendered or offered to pay to appellant the amount due on the contract between Ray and Koontz. On February 9, 1900, the appellant, Brummett, received a deed from the state conveying to him the land described in the Koontz contract, including the land involved in this action, and subsequently, and before the commencement of this action, the respondents tendered to appellant the full amount due for the land described in the complaint herein, and demanded from him a deed therefor in accordance with the contract between Koontz and Ray, which tender and demand were refused. On May 16, 1900, this action was commenced, the appellant alleging in his complaint, in substance, among other things, that on or about the third day of July, 1896, he was the owner of, and seized of a certain estate in, and possessed of and entitled to possession of, that certain described tract of land situate in Chehalis county, Washington, particularly describing it; that his

interest in said lands at said date consisted of, and his possession and right of possession were based upon, a certain contract with the state of Washington for the purchase of said lands, which contract was then in full force and effect and without default; that while he was so seized and possessed of said lands the defendants (respondents) on or about the first day of December, 1896, without right or title, and against the protest of the plaintiff, entered into the possession of said lands and premises and ousted and ejected the plaintiff therefrom, and have ever since and now unlawfully withhold the possession thereof from the plaintiff, to his damage in the sum of \$200; that subsequently, and on February 9, 1900, the plaintiff received from the state of Washington, pursuant to his said contract, a deed to said lands and premises, which deed was duly executed and delivered to the plaintiff, and duly recorded in the office of the auditor of Chelalis county on February 13, 1900, in Book 58 of Deeds, at page 43 thereof; that the value of the rents and profits of said premises from the said first day of December, 1896, and while plaintiff has been excluded therefrom by defendants, is thirty dollars per annum; that plaintiff has repeatedly demanded of the defendants the possession of said premises, but such requests have been refused and denied. The prayer of the complaint is for judgment against the defendants for the possession of said lands and premises, for \$200 damage for withholding possession thereof from plaintiff, for the sum of \$30 per annum, as the value of the rents and profits of said lands, for his costs herein, and for such other and further relief as to the court may seem just and equitable. The defendants, after admitting certain allegations in the complaint and denying others, set up in their answer two affirmative

defenses, one of which they designate a counterclaim, praying that the plaintiff be decreed to be a trustee of the lands in question and described in the complaint, and that he be ordered to convey the same to them. In their affirmative defenses the defendants, briefly stated, alleged the making of the contract between the state and Koontz, for the sale and purchase of the lands described therein, including the land in controversy, the execution and delivery of the contract of March 14, 1891, between Koontz, the state's grantee in said contract, and John A. Ray, the owner and possessor of the improvements on the land in dispute, which last named contract was made a part of the answer, and the assignment and transfer by Koontz of his contract with the state, subject to all the agreements and obligations therefor entered into by said Koontz with Ray in regard to the lands referred to in plaintiff's complaint. It is also alleged in the answer that by virtue of a sheriff's deed, dated the 13th day of September, 1897, and recorded in Book 52 of the records of deeds of Chehalis county, on page 271 thereof, and of the several instruments and foreclosure proceedings leading up to and authorizing the execution of said deed, and also by virtue of the sheriff's certificate of sale, dated August 9, 1896, and surrendered to the sheriff at the time said deed was executed and delivered, all of which proceedings were had in the superior court of Washington, for Chehalis county, in a certain cause in which the defendants herein, John Campbell and Mary Campbell, were plaintiffs, and John A. Ray *et al.* were defendants, these defendants, John Campbell and Mary Campbell, became the due and lawful owners and entered into the lawful and peaceable possession of the tenements, buildings, and improvements, including fences, crops,

fruit trees, clearing, etc., on the land referred to in plaintiff's complaint, together with the right, title, and interest of the said John A. Ray and Prudence Ray, his wife, in and to said described land, and all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in any wise appertaining; and that by virtue of said ownership said defendants John Campbell and Mary Campbell entered into possession of all of said premises, and ever since have been and now are in the lawful and peaceable possession thereof, and are the owners thereof. It is further averred in paragraph 3 in the respondent's second defense, by way of counterclaim, that under and by virtue of a sheriff's certificate of sale, dated and delivered to defendants, John Campbell and Mary Campbell, on or about the 29th day of August, 1896, and of a sheriff's deed thereafter executed and delivered to said defendants, on or about September 13, 1897, which deed is recorded in the office of the auditor of Chehalis county, Washington, in Book 52 of records of deeds, on page 271, these defendants, John Campbell and Mary Campbell, became the assignees and entitled to all the rights of said John A. Ray to said land herein mentioned, including the right to purchase the same and receive a good and lawful deed therefor, upon the payment of certain sums provided to be paid by the terms of said contract. The answer also alleges in effect, a tender by defendants to plaintiff, Brummett, of the amounts due upon the contract between Ray and Koontz at the times when the same were payable; that they paid all unpaid taxes found due on the premises in question in accordance with the terms of said contract, and that they have at all times been ready and willing to do and perform all things required of them by the terms of said

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contract; that after the delivery of the state's deed to plaintiff, and before the commencement of this action, the defendants tendered and offered to pay to plaintiff the full amount due according to the provisions of the contract between Koontz and Ray, and demanded a deed to the lands and premises described in said contract, but plaintiff refused to comply with said demand, or to receive any of the money so tendered, and that defendants are still ready and willing to pay all of said sums, and herewith bring in, tender, and deposit in court the sum of \$90.52 for plaintiff, or subject to the further order of the court, being the full amount due on said contract to plaintiff. And the defendants Campbell prayed that the plaintiff be ordered and adjudged to convey to them, by a good and sufficient deed, the lands described in the complaint, and for costs. A demurrer was interposed by plaintiff to the affirmative defenses on the alleged ground that neither of them stated facts sufficient to constitute a defense, which demurrer the court overruled. After all the evidence had been introduced, the court directed the jury to return a verdict for the defendants, which was accordingly done, and the court thereupon rendered judgment in accordance with the prayer of the defendants' affirmative answer.

It is claimed by the learned counsel for appellant that the court erred in overruling the demurrer to respondents' so-called counterclaim, for the reason that there is no direct averment therein that respondents ever succeeded to the rights of Ray, or that Ray had any rights at the time alleged. And it is argued that the statement in paragraph 3, above mentioned, that by virtue of a sheriff's certificate and deed, etc., the defendants became the assignees and entitled to all the rights of said Ray to said

lands herein mentioned is a mere conclusion of law, and not an averment of an issuable fact. It is a general rule that conclusions of law should not be pleaded, and that only the facts constituting the cause of action or the grounds of defense should be stated by the pleader. Neither is it proper, under the settled rules of law, to plead probative facts, or, in other words, the evidence by which essential facts may be established. But if a fact be stated, and also the reason for its existence, the allegation of fact will not be affected by such additional and useless statement. Under our practice immaterial or redundant matter in a pleading may be stricken out on motion of the opposite party. While the answer in this case might have been made more concise and explicit than it is, we are of the opinion that it states sufficient facts to entitle the respondents to equitable relief, especially when considered, as it ought to be, as a whole. And our conclusion is that the court did not err in overruling appellant's demurrer.

It is next insisted that the court erred in directing a verdict against appellant, for the reason, as stated in appellant's brief, that "the case made shows title in plaintiff, and also possession without right in defendants. This entitled plaintiff to recover." It is true that the legal title was shown to be in appellant. In fact, that was admitted in the respondents' answer. But it does not necessarily follow that the respondents were not rightfully in possession, or that appellant was entitled to recover. The vital question in the case as made was whether the respondents were entitled to the equitable relief demanded in their answer, and attempted to be established by the proofs; and that was a question for the consideration of the court, and not the jury; and the court having, in our judgment, determined it correctly, appellant was not

prejudiced by the directed verdict. It must be borne in mind that the act of the legislature of 1890, relating to the leasing and sale of school lands, and by virtue of which appellant obtained his title, provided, in effect, that the purchaser of such lands should, before receiving a deed, pay to the lessee and owner of any improvements thereon the value of such improvements, as determined by the board of appraisers. And the object of the contract of March 14, 1891, between Ray and appellant's assignor, Koontz, was to enable the latter (and his assigns) to obtain title to all the land embraced in the state's contract without paying for the improvements on that portion thereof which appellant seeks to obtain possession of by this action, and to secure a conveyance of the same to the former, and thereby vest him with complete ownership of both the land and the improvements thereon. The appellant was fully aware of the obligation of Koontz under this contract to convey this land to Ray on payment of the stipulated price thereof, at the time he became the assignee of the contract between Koontz and the state. In fact, he not only recognized the existence and legality of this agreement with Ray, but actually received from Ray the payments due thereunder up to at least the latter part of the year 1894, if not still later. It is claimed, however, by appellant, that the contract with Ray was mutually abandoned in 1894, and that Ray thereafter held the premises as a mere tenant of appellant; and testimony to that effect was given by both appellant and Ray. But their testimony in that regard is so unreasonable and unsatisfactory that the trial court was justified in considering it entitled to but little, if any, weight or credit, in view of other facts and circumstances in evidence. And, moreover, the rights of

the respondents had attached before the time when this agreement between appellant and Ray is alleged to have been made, and it can hardly be seriously contended that their rights, whatever they were, could be abrogated by any such secret arrangement. Neither can Mr. Ray or the appellant be heard to say that he or they thus forfeited and destroyed the rights of the respondents. No one will be allowed to come into a court of equity and attempt to take advantage of his own wrong, or to profit by his own fraud. The respondents are now in lawful possession of the premises from which appellant seeks to oust them; and are, by purchase at a judicial sale, evidenced by the sheriff's deed, the owners of the improvements thereon, and of all the right, title, and interest of Ray therein or thereto. They have offered to pay to appellant the balance due him in accordance with the contract with Ray, and which he assumed and recognized until he deemed it to be to his advantage to repudiate and disregard it entirely. They are still willing to make such payment, and appellant refuses, and has at all times refused, to receive it, or to comply with their demand for a deed. He does not claim, or even pretend, that he has paid respondents for their improvements; and the fact that the improvements have not been paid for is alone sufficient to defeat this action. This court has repeatedly held that one lawfully in possession of school lands, and having improvements thereon, has a right, as against a subsequent purchaser, to retain possession until paid therefor. *Wilkes v. Hunt*, 4 Wash. 100 (29 Pac. 830); *Pearson v. Ashley*, 5 Wash. 169 (31 Pac. 410); *Wilkes v. Davies*, 8 Wash. 113 (35 Pac. 611, 23 L. R. A. 103). See, also, *Hart Lumber Co. v. Rucker*, 15 Wash. 456 (46 Pac. 728).

In this instance, however, the respondents do not desire

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merely to prevent a recovery by appellant. They ask affirmative relief as well, and we think they are equitably entitled to all the relief demanded and granted by the superior court. Objections are made to certain rulings of the court in the admission of evidence, both oral and documentary, but, inasmuch as that which was not strictly legitimate was, under the circumstances, absolutely harmless, the appellant was in no wise prejudiced thereby.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ., concur.

[No. 4536. Decided July 29, 1903.]

STELLA E. SMITH, *Respondent*, v. W. F. NEWELL *et al.*,
Defendants, and DAVID MITCHELL *et ux.*, *Appellants*.

TAXATION — DELINQUENCY CERTIFICATE — FORECLOSURE — SUMMONS.

A summons in a tax foreclosure of a certificate of delinquency subscribed by "M. L. Agent for" the plaintiff, followed by his place of residence in this state, is sufficient under Laws 1901, p. 384, providing that it shall be subscribed by the plaintiff or some one in his behalf, residing in the state.

PLEADING — VERIFICATION — AMENDMENTS DEEMED TO HAVE BEEN MADE.

A motion to quash a proceeding to foreclose a tax certificate because the complaint is not properly verified, is properly overruled, as Bal. Code, § 6535, requires the court to "consider all amendments which could have been made as made."

TAXATION — CERTIFICATE OF DELINQUENCY — NOTICE OF DIVIDING THE TAX.

A certificate of delinquency upon one half of a tract of land, divided and apportioned at the request of the holder, under Laws 1899, p. 285, is not void because the county treasurer failed to give notice by registered mail to the owners interested that they

might protest against such apportionment, as required by § 11, p. 294, in view of the further provision (§ 18, p. 299) that no error or informality in the proceeding shall vitiate the tax, but that the court may correct defects in the foreclosure action, where the apportionment made was found by the court to be just to the owners complaining.

SAME.

Where the owners are given their day in court, and an opportunity to question the tax, and it appears to be just, the court ought not to declare the tax void because of the omission of a ministerial officer to perform a statutory duty, but a showing of injury incapable of correction is necessary.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Affirmed.

Vance & Mitchell, for appellants:

The provisions for notice are for the substantial benefit and protection of the owner and are mandatory. *Lyon v. Alley*, 130 U. S. 177 (32 L. ed. 899); *French v. Edwards*, 13 Wall. 506 (20 L. ed. 702); *Lockwood v. Roys*, 11 Wash. 697.

George H. Funk, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—In the years 1893 and 1894 block 90 of Sylvester's Plat to the city of Olympia was owned by one person, and was assessed for each of those years at a valuation exceeding two thousand dollars. On November 13, 1900, the taxes on this block remaining unpaid, the respondent applied to the county treasurer of Thurston county for a certificate of delinquency for the taxes due upon the east half of the block. This part of the block was then owned by the appellants, David Mitchell and wife; the west half belonging to a person not made a party to this proceeding. The county treasurer,

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on the application for the delinquency certificate being made to him, divided the tax levied against the block into two equal portions, and issued to the applicant a certificate of delinquency for one of such portions as the taxes due and delinquent on the east half of the block named, but did not then or thereafter notify by registered mail the several owners interested in such tract of the fact that he had made such a division of the taxes assessed thereon. Later the applicant paid the taxes subsequently assessed against the portion of the block against which she held the delinquency certificate, and commenced this action to foreclose the lien evidenced thereby. The appellants contested the right of the respondent to foreclose, questioning the sufficiency of the procedure as well as the right itself. The trial resulted in a judgment for the respondent for \$825.77, from which judgment this appeal is taken.

The appellants first appeared specially and moved to quash the summons, contending that it was not subscribed as required by sub. 4 of § 1 of the act of March 20, 1901 (Session Laws 1901, p. 384), and therefore insufficient. Whether this objection is open to the appellants in this court, after having made a general appearance in the action in the court below, we think may be questioned; but, passing the point, we find no merit in the objection itself. The requirement of the statute is that the "summons shall be subscribed by the holder of the certificate of delinquency, or by some one in his behalf, and residing within the state of Washington." This summons was subscribed, "Millard Lemon, agent for Stella E. Smith," followed by his place of residence, showing it to be within the state. This is a sufficient compliance with the statute. When a summons is subscribed by some one other than the cer-

tificate holder, it is not made a prerequisite to its validity that it appear on its face that such person subscribed it on behalf of such holder, nor would a recital to that effect be conclusive of the fact. Hence, when an application is signed by some person other than the certificate holder, it is presumed to be authorized, conclusively so until overcome by proof to the contrary.

It is next said that the verification to the complaint is insufficient, and that the court erred in refusing to quash the proceedings for that reason. But if the objection were well taken, it is not available here. The defect complained of is one that does not affect the merits of the controversy, and was capable of being amended in the trial court. In such cases this court is required by statute to "consider all amendments which could have been made as made," and decide the cause upon the merits. Bal. Code, § 6535. It will therefore treat defects of this kind as amended, or, what is better, perhaps, disregard them.

The principal contention is that the certificate of delinquency sought to be foreclosed is void. Section 11 of the act of March 15, 1899 (Session Laws 1899, p. 294), provides that:

"Any person desiring to pay taxes upon any part or parts of real estate heretofore or hereafter assessed as one parcel, or tract, may do so by applying to the county treasurer, who must carefully investigate and ascertain the relative or proportionate value said part bears to the whole tract assessed, on which basis the assessment must be divided, and taxes collected accordingly: Provided, where the assessed valuation of the tract to be divided exceeds two thousand dollars, a notice by registered mail must be given to the several owners interested in said tract, if known, and if no protest against said division be filed with the county treasurer within twenty days from date of notice, the county treasurer shall duly accept

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payment and issue receipt on apportionment as by him made.”

If a protest is filed the matter is referred to the board of county commissioners at the next regular session, which finally determines the differences between the parties. As we have said, the assessed valuation of the tract divided in this instance exceeded two thousand dollars, and it is conceded that no notice was sent by the treasurer to the several persons interested in the tract of the division made by him. It is on this omission that the contention is founded that the certificate in suit is void. But the same law which requires that notice be given persons interested when a division of the taxes is made, if the assessed valuation is over two thousand dollars, further provides that no error or informality in the proceedings of any of the officers connected with the assessment, levying, or collection of taxes, shall vitiate or in any manner affect the tax, but that the court may in the foreclosure action correct defects and supply omissions made by such officers. Session Laws 1899, p. 299, § 18. This provision of the statute, it seems to us, was intended to enable the courts to correct just such omissions as were made by the treasurer in this instance. It was intended to put it in the power of the court on the hearing of a tax foreclosure suit to render judgment as the evident justice of the case required; that is, it was intended that the courts should inquire into the merits of complaints made against tax proceedings, and allow them to prevail only when the matters complained of operated to the injury of the complaining party, and is incurable by any judgment that can be entered in the foreclosure proceedings. The latter difficulty is not present in this case. The lower court found as a fact, and the finding is unchallenged in this

court, that the appellant's half of the block was of greater value than the other half, while the tax levied against it was equally divided. No injury, therefore, was done the appellants by the division; and we think that, if effect is to be given to this section of the statute, the proceedings ought not to be set aside.

But why may not the proceedings be sustained on broader grounds. The state had power to levy the tax originally, and power to more specifically apportion it after it was levied. By its final action it has charged the land with no more than its just share of the public tax. It has violated no constitutional right of the appellants. Before declaring the lien of the tax irrevocable, it has given them their day in court, where they had the opportunity to dispute every question going to the right and power of the state to charge the property with the tax. Despite this opportunity, it has not been shown that the property has been charged with a single dollar that it ought not, in justice and right, to be charged with. Surely, where these conditions appear, the courts ought not to declare the tax void because of the mere omission of a ministerial officer to perform a statutory duty. When a tax is declared void, the effect is always to release certain property of its just proportion of the public taxes, and unjustly increase that of other property. On the plainest principles of equity and justice, therefore, the courts ought to insist that a showing of injury incapable of being corrected be made, before it declares the tax void. We think the judgment should stand affirmed, and it is so ordered.

MOUNT, HADLEY, ANDERS and DUNBAR, JJ., concur.

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[No. 4611. Decided July 29, 1903.]

ALBERT E. JONES, *Appellant*, v. WESTERN MANUFACTURING COMPANY *et al.*, *Respondents*.

PLEADINGS — AMENDMENTS.

It is proper to allow an answer to be amended to correspond with the proofs after a case has been appealed and remanded for a new trial.

WITNESSES — CROSS-EXAMINATION.

Cross-examination relating to matters not touched upon in chief is properly excluded.

EVIDENCE — REBUTTAL — REPEATING QUESTIONS.

The refusal to permit the witness on rebuttal to answer a question the second time does not require a reversal.

CORPORATIONS — STOCKHOLDERS.

A person is not a stockholder in a company when he assigns his stock to another for the purpose of selling the same along with other stock within ninety days, where the same is actually sold within the period to an innocent purchaser.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

Frank H. Graham, for appellant.

Govnor Teats, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—This action was before this court at a former session, and will be found reported in 27 Wash. 136 (67 Pac. 586) where will be found also a full statement of the case. After the remittitur went down on the former appeal, a trial was had of the cause upon its merits, resulting in a judgment for the respondents. This appeal is from that judgment.

The appellant complains that the court erred in permitting the respondents to amend their answer after the

cause had been remanded by this court for trial on its merits, and also that it erred in the admission and exclusion of evidence. The amendment made to the answer was one proper under the circumstances, as it tended to make it correspond with the proofs. Nor did it come too late. The Code allows an amendment, when necessary for the furtherance of justice, at any stage of the proceedings; and an amendment may be had after a cause has been appealed to this court and remanded for a new trial, as well as on the original trial of the cause. The objections to the exclusion of evidence are equally without merit. The question propounded to the witness Dixon on cross-examination related to matters not touched upon by him while giving his testimony in chief, and the objection thereto was properly sustained on the ground that it was not proper cross-examination. The question asked the appellant in rebuttal, namely, "Was the note given you by Phillips ever paid?" Was answered in the negative by the witness when on the stand testifying for himself while presenting his case in chief. The refusal of the court to permit the witness to answer the question a second time does not require that the case be remanded for further evidence. The errors relating to the admission of evidence need no consideration further than to say that the court will, when examining the issues of fact, look only to that which was properly admitted.

The principal question is, is the appellant a stockholder in the respondent corporation? The trial court found that he is not such a stockholder, and we think the finding is supported by the weight of the evidence. It appears that the appellant, shortly after the respondent The Western Manufacturing Company was incorporated, purchased five shares of its capital, which he afterwards transferred

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to the defendant Phillips. He testified that the transfer was not an absolute sale, but only for the purpose of enabling Phillips to sell the same along with certain stock of his own, which he represented himself as being desirous of selling, and that the sale was to have been made by Phillips within ninety days from the date of the transfer; that at the end of that time he revoked Phillips' authority, and demanded a return of the shares, which was refused him both by Phillips and by the corporation, to whom, he says, Phillips claimed to have assigned them. Phillips, on the other hand, testified that he was an absolute purchaser of the shares. Moreover, he testified that he did sell them, prior to the expiration of the ninety days testified to by the appellant, to a Florence Gawley, for a valuable consideration, namely, \$480; and in this he is corroborated by the testimony of the purchaser, her husband, and Phillips' receipts for the purchase price, which was paid in installments. This being true, the appellant cannot claim to be a stockholder in the corporation, even if we accept his version of the transfer to Phillips as the true one. Confessedly, Phillips had a right to sell the stock at any time during the period of ninety days, and his sale and transfer of the same during that time would pass an absolute title, whether the purchaser knew of his relations to the stock or not, unless, of course, the sale was made for the purpose of defrauding the owner, and the purchaser had knowledge of and participated in that fraud. Of fraud, however, there is nothing in the present record.

The judgment is affirmed.

MOUNT, HADLEY and DUNBAR, JJ., concur.

ANDERS, J., concurs in the result.

[No. 4695. Decided July 29, 1903.]

RAND, McNALLY & Co., *Appellant*, v. W. G. HARTRANFT
et al., *Respondents*.

SCHOOLS — TEXT BOOKS — CONTRACT OF STATE BOARD — CHANGE OF
COURSE OF STUDY.

After the state board of education has adopted a series of text books, and prescribed a course of study, and made a contract with a publisher for the use of its books for five years in certain grades of the public schools, a county board will be enjoined from so changing the course of study for such grades that approximately twenty per cent. less students in the schools of a city will use such books during the year.

SAME — REVIEWING STATE BOARD OF EDUCATION.

The fact that such course of study was inadvisable is immaterial, and the courts cannot review the action of the state board except for fraud.

SAME — STATUTES — IMPAIRING OBLIGATION OF CONTRACT.

The contract of the state board of education for the purchase of school books for a period of five years cannot be impaired by subsequent legislation.

Appeal from Superior Court, King County.—Hon.
BOYD J. TALLMAN, Judge. Reversed.

Ballinger, Ronald & Battle and Vance & Mitchell, for
appellant.

W. T. Scott and D. C. Conover, for respondents.

The opinion of the court was delivered by

HADLEY, J.—This case was once before in this court on another appeal. The opinion rendered at that time will be found reported in 29 Wash. 591 (70 Pac. 77). Reference is hereby made to that opinion for a full statement of the issues involved in the case. Respondents had answered, admitting the change in the use of the school

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books as provided by appellant's contract with the state, as alleged in the complaint. The change consisted in withdrawing entirely from use in the first year of the schools the book called "Lights to Literature, Book 1," required by the contract to be used in said year, and in transferring said book to the second year for use therein. The book provided by the contract for the second year was in like manner transferred to the third year for use therein. In the same manner the books provided by the contract for use in the several grades from one to six, inclusive, were each transferred to the next succeeding grade, thus leaving the first grade without the use of any of appellant's readers, and establishing their use in the seventh grade, which was not included in the contract. Appellant by its complaint sought an injunction against respondents to prevent them from continuing the change of books as above stated, and alleged that it was materially damaged by such change. The answer, however, alleged that the readers were still used in the same number of grades as provided by the contract, and that the adoption and use of the books as changed has not, and will not, decrease or lessen the sales of any book or books contracted to be furnished by appellant. Appellant demurred generally to the affirmative matter contained in the answer and the demurrer was overruled. Appellant then elected to stand upon its demurrer and declined to plead further. The court thereupon entered judgment denying the injunction and dismissing the action. This court held that the demurrer was properly overruled, on the ground that the answer alleged that no actual damage had accrued or would accrue to appellant by reason of the acts of respondents alleged in the complaint. It was our view that a court of equity should not interfere by injunction on behalf of one who is merely

nominally damaged, and that the wrong asserted must be more than a mere technical or inconsequential one to warrant equitable interference. After so holding, the former opinion concluded as follows:

“However, in view of the extensive field covered by this contract, involving as it does the school districts throughout the entire state, and in view of the further fact that the principles here involved may apply to other similar controversies that may possibly arise, we believe it may be in the interest of all concerned, and may tend to lessen the number of such controversies, if this case shall be heard upon proofs, should the appellant so desire. We therefore instruct the lower court to grant appellant a reasonable time to further plead to the answer and submit proofs, if it so desires; in which case the judgment entered shall be vacated, but otherwise it shall stand affirmed.”

It is not usual to remand a case for further proceedings, as the record stood upon the former appeal; but the reasons therefor as quoted above we believed were sufficient to justify such a course. Upon the return of the case to the superior court appellant replied to the answer and denied the averments thereof, that the change of books would not lessen the number of sales and that appellant has not been and will not be damaged thereby. Upon the issues joined, as outlined in the former opinion and as further indicated herein, the cause came on for trial before the court without a jury. Proofs were submitted, and the court rendered judgment for respondents and dismissed the case. It is now here upon appeal from said judgment.

At the trial it was stipulated between the parties that during the school year beginning July 1, 1901, and ending June 30, 1902, pupils were enrolled in the public schools of King county, exclusive of the city of Seattle, for the several grades or years as follows: For the first year

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of said schools, the number of 2,082; for the second year, 1,288; for the third year, 1,434; for the fourth year, 1,238; for the fifth year, 1,044; for the sixth year, 743; for the seventh year, 584, and for the eighth year, 440. An examination of the above figures shows that the total number of pupils enrolled in the first six grades or years was 7,829. It will be observed, by reference to the former opinion in this case, that the state board of education, as it was authorized by law to do, adopted a series of text books for use in the public schools of the state and prescribed a course of study for use in said schools. Having adopted appellant's readers for use in the first six years of the schools, it follows that, if that adoption had been followed in the schools of King county, at least approximately the number of pupils enrolled for the year above mentioned must have used appellant's books during that year. Under the change that was made by respondents, the use of appellant's books was discarded for the entire number of 2,082 enrolled in the first year. Under the plan of excluding the books from the first grade and including them in the seventh, we find the total enrollment for the year from the second to the seventh grades, inclusive, was 6,331. The grades from one to six, inclusive, for the year mentioned, therefore, had an enrollment of 1,498 more pupils than those from two to seven, inclusive. While the above figures may not be accepted as absolutely accurate in determining the effect of the change of books upon appellant's contract, yet we see no reason why they do not indicate approximately the relative number of pupils enrolled in the different grades from year to year. The relative enrollment must also indicate the relative number of appellant's books that will be used by the pupils, if its contract with the state shall

remain operative as made. The loss of sales indicated by the above figures is about twenty per cent., and its effect upon the value of a contract of the magnitude of the one involved here amounts to such serious impairment as we think warrants a court of equity in interfering to prevent such impairment.

At the trial below the court heard evidence in behalf of respondents as to the advisability of using appellant's reader in the first year of the schools. The evidence was to the effect that the reader is too deep for use in that grade, and that by the use of another more rapid and effective results may be obtained for the pupils. We think this evidence was immaterial. The legislature first lodged the power in the state board of education to determine what books should be used, and to enter into contract in behalf of the state with publishers to furnish them. In delegating such power to the state board of education, the legislature undoubtedly intended that the members of the board should be accomplished educators and learned in the modern methods of teaching. The courts cannot say that they were not such, and that their judgment was inferior, when contractual rights are involved, and where it is merely a question of difference in opinion between educators as to the wisdom of their selection of text books. If the selection and adoption of books by the board were involved in actual fraud on the part of the parties to a contract, and if fraud were an issue, then, perhaps, the courts might consider the character of the books adopted, in so far as it might tend to show the gross neglect of duty and a failure to exercise the ordinary judgment common to reasonable men. Such an issue is not before us.

Respondents are acting under what they claim to be

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Syllabus.

the authority of a legislative act passed after the appellant's contract was made. The contract was, however, a valid one when made, and by its terms was to continue in operation for the period of five years from and after September 1, 1900. We said before in this case that "the contract must be held to be a valid one, and it must not be impaired by any subsequent legislative enactment, or by the action of any board proceeding by authority of such subsequent legislation." The duty of courts to guard the sacredness of contracts is too well established and understood to require comment here. The stability and effectiveness of business transactions must largely depend upon this security. It is not for us to exercise our judgment, and say that a wiser contract might have been made; but it is our duty to enforce valid contracts as made by those lawfully authorized to make them.

The judgment is reversed and the cause remanded, with instructions to the lower court to grant the injunction prayed.

FULLERTON, C. J., and MOUNT and ANDERS, JJ.,
CONCUR.

[No. 4639. Decided July 29, 1903.]

R. B. TOLSMA, *Respondent*, v. GEORGE B. ADAIR *et al.*,
Appellants.

LANDLORD AND TENANT — UNLAWFUL DETAINER — MERGER OF ESTATES.

Where the lessee of a building sublets the second and third floors for the whole of the term of several years for \$50 a month, and subsequently the second floor is surrendered by the sub-tenant, who then pays \$20 per month, and the sub-tenant testifies that it was only a temporary surrender until he had use for it, while his landlord testifies that it was an absolute surrender

and claims a merger, a verdict of restitution in favor of the sub-tenant and damages for detention resolves the question in his favor, and there could be no merger of estates by the temporary surrender.

SAME.

There was no merger in law, because there was an intermediate estate, retained by the sub-tenant, who did not yield his whole estate, but only carved out a lesser estate, a tenancy from month to month for a limited time.

SAME.

The fact that the tenant ceased to pay the \$50 per month, is not conclusive as to the merger, and the fact that he continued to pay one-half the water rent of the whole building is argumentative support for his contention that there was no merger.

Appeal from Superior Court, King County—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

I. D. McCutcheon and Peters & Powell, for appellants:

When the lesser and greater estates meet without any intermediate estate there is a merger, and a person cannot be at the same time both landlord and tenant of the same premises. 2-Taylor, Landlord & Tenant (8th ed.), § 502; Wood, Landlord & Tenant, § 505. *Williams v. Jones*, 1 Bush, 621; *Grimman v. Legge*, 8 B. & C. 324; *Auer v. Penn*, 99 Pa. St. 370; *Logan v. Anderson*, 2 Doug. (Mich). 101.

There was a surrender of the second story. *Lyon v. Reed*, 13 Mees. & W. 285; *Dills v. Stobie*, 81 Ill. 202; *Talbot v. Whipple*, 14 Allen, 177; Taylor, Landlord & Tenant (8th ed.), § 515; Wood, Landlord & Tenant, §§ 495, 497.

A lease for a term of years may be terminated by the landlord's resuming control with the tenant's consent. *Williams v. Jones*, 1 Bush, 621; *Donkersley v. Levy*, 38 Mich. 55; *Logan v. Anderson*, 2 Doug. (Mich). 101;

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Baker v. Pratt, 15 Ill. 568; *Welcome v. Hess*, 90 Cal. 507; *Gray v. Kaufman Dairy, etc., Co.*, 162 N. Y. 388 (49 L. R. A. 580); *Lamson Consol. Store Service Co. v. Bowland*, 114 Fed. 639.

All the foregoing propositions are upheld by the following: *Smith v. Pendergast*, 26 Minn. 318; *Stobie v. Dills*, 62 Ill. 432; *Mitchell v. Blossom*, 24 Mo. App. 48; *Martin v. Stearns*, 52 Iowa, 345; *Bedford v. Terhune*, 30 N. Y. 453; *Auer v. Penn*, 99 Pa. St. 370; *Hill v. Robinson*, 23 Mich. 24; *Welcome v. Hess*, 25 Am. St. Rep. 145.

Ballinger, Ronald & Battle (A. J. Tennant, of counsel),
for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by respondent against appellants to recover possession of the second story of the building designated as No. 309 Occidental avenue, in the city of Seattle, which it is alleged is unlawfully detained by appellants. The cause was tried before a jury and a verdict was returned that respondent is entitled to restitution of the premises, and to recover damages in the sum of \$270. Appellants moved for a new trial, which was denied, and judgment was entered in accordance with the verdict. The case is now before this court on appeal from said judgment.

The facts are substantially as follows: The building which contains the floor in question is a three-story brick structure having also a basement floor. On October 30, 1899, the New England Northwestern Investment Company was the owner of the property, and on said date the said company, in writing, leased the entire building to respondent for a term of two and one-half years from

November 1, 1899. The lease contained a provision, giving to respondent, as lessee, the option to continue the lease upon the same terms for an additional period of two and one-half years. On December 4, 1899, respondent, with the consent of the lessor, assigned said lease to George H. Adair. The assignee took said assignment for the use and benefit of appellants as partners. The assignment was made by respondent having in view the fact that his business required the use of no more of said building than the second and third floors, and the partnership composed of appellants desired to use and occupy the first floor and the basement for their business. It was, therefore, agreed that for certain purposes of convenience, not necessary here to state, respondent should assign the lease to the entire building and should at the same time receive for himself from the assignee a lease for the second and third floors of the building for the same term, including also the additional term under the option as covered by the main lease. The rent to be paid by respondent for said two floors was \$50 per month, and he was also to pay one-half the water rates for the building. The assignee of the main lease, in behalf of appellants, made to respondent a lease in writing of the above import, and respondent continued in possession of the second and third floors as a sub-tenant of appellants, and regularly paid them the stipulated rent of \$50 per month, and also one-half the water rates for the building. This arrangement continued for some time, and during a part of the time respondent leased the second floor to others. Inasmuch as respondent did not have continual use for the second floor in his own business, appellants desired to procure its use for their business. After some negotiations an arrangement was verbally effected, by which appellants were to occupy the second floor. Respondent first valued the

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monthly rental of the floor at \$35, but finally agreed upon \$30, and under the new arrangement he paid to appellants \$20 per month and one-half the water rates for the building. The latter sum, it will be observed, was the amount left of the monthly rental paid by respondent to appellants under his written lease from them for both the second and third floors, after deducting the \$30 for the use of the second floor by appellants. Here arises the difference between the parties upon which this action is founded. It will be remembered that respondent's sublease from appellants for the two upper floors covered the entire term of the main lease for the whole building, which was then held by appellants. Respondent testified, in effect, that as he had no immediate use for the second floor, it was agreed that appellants could occupy it upon the terms above stated until such time as he desired it for his own use. He therefore contends that appellants became his tenants from month to month for the second floor. One of the appellants, upon the other hand, testified that nothing was said by respondent about their occupying said floor until such time as he desired it, and appellants contend that there was an absolute surrender to them of respondent's estate in the second floor, and that, since they held the greater estate—the lease for the whole building—the smaller estate thereby was merged in the greater. Respondent's business having enlarged so that he desired to re-occupy the second floor, he proceeded upon the theory that appellants were his tenants for said floor, and gave them notice that the tenancy was terminated. They refused to surrender possession, and this suit followed.

The verdict of the jury amounts to a finding that respondent's contention as to the facts is correct. Under that theory there could have been no merger. A smaller estate

was simply carved out of respondent's estate, and was held for the time being by appellants. Appellants urge that respondent's position is untenable, in that it makes him both tenant and landlord of his landlord. He did not, however, undertake to become landlord of the entire estate which he held as a tenant, but only of a portion thereof, and he did not surrender his entire estate in any portion of his tenancy. It is true, he was the tenant of appellants, holding an estate that included the two upper floors of the building, but it cannot be doubted that he could have created a smaller estate out of the one held by him by sub-letting to a third party. Holding, as he did, a definite estate for a given time, we see no reason why he could not grant to appellants a smaller one therefrom, reserving some estate in himself, in the same manner he might have done to another person. Respondent's position upon the facts demolishes the theory of a merger, since the estate granted to appellants under respondent's testimony was a limited one, and was not a surrender of the whole estate. It did not include the whole of respondent's estate in the second floor of the building, but was limited to such time as he should choose to end it. Since respondent did not yield his entire estate in the second story, he therefore had a reversionary interest therein, with the right to enter into the enjoyment of the same at any time when he chose to terminate appellant's estate, which was a tenancy from month to month only. At law the rule as to merger is more inflexible than in equity, the latter having more regard for the intention of the parties and the injustice that might follow from permitting a merger. But at law the rule is that, where a greater and lesser estate coincide and meet in the same person and in the same right, without any intermediate vested estate, the lesser is immediately

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annihilated, and is said to be merged. 20 Am. & Eng. Enc. Law (2d ed.), 588; Anderson's Law Dictionary, 671; 2 Bouvier's Law Dictionary (Rawle's Revision), 400, 401. The above definition is elementary, and has been followed generally by the authorities, which it seems unnecessary to cite here. It will be observed that one element necessary to create a merger is that there shall be no intermediate estate between the two that have come together in the same person. Under the facts here, as they must have been found by the jury, there was such intermediate estate. Respondent did not yield his whole estate in the second story, and that which he retained became intermediate between what he did yield and the greater estate held by appellants. There was, therefore, no merger. If respondent had assigned or surrendered to appellants his entire leasehold estate for the entire term of his lease, then there would have been no intermediate estate, and a merger would have resulted. The same might also have been true of the second story if he had surrendered his entire estate therein.

It is argued by appellants that after they began to occupy the second floor the respondent ceased to pay them rent for any but the third floor, and that this fact shows that he surrendered the second floor. Respondent, upon the other hand, claims that since he was obligated under his lease to pay appellants \$50 per month, and they, under their sub-lease, were to pay him \$30 per month, it was agreed that, to avoid a double payment, the one account should offset the other each month to the extent of \$30, and that he should monthly pay the difference of \$20. This method he says was pursued for mere convenience in adjustment of accounts. The fact as to the method of payment is in no sense conclusive against respondent, and the

jury have determined it in his favor. A further fact in connection with the payment may be said to weigh in respondent's favor. After he sub-let to appellants, he continued to pay the same water rates he had previously paid; that is to say, one-half the rates for the entire building. Appellants occupied the basement and two other floors of the building, while respondent occupied but a single floor. If appellants were not respondent's tenants for the second floor, and if the latter had absolutely surrendered it, then the former stood in the position of holding an estate in three floors of the building, while the latter held but one, and yet he paid the same water rates as those whose estate covered three times the space of his own. This is not a conclusive fact one way or the other, but it may be urged as at least argumentative in favor of respondent's position, wherein he claims that appellants were his tenants for the second floor, and that he provided the water service of that floor for their use. All these facts have been resolved by the jury against appellants. Some complaint is made of the court's instructions, but we think they correctly and pointedly stated the law applicable to the issues as joined.

We find no error, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4660. Decided July 30, 1903.]

ARCHIE S. ASH, *Appellant*, v. CHARLOTTE CLARK, as
Trustee, Respondent.

GAMBLING — CONTRACTS — VALIDITY OF CHECKS.

A check issued for money advanced for the purpose of gambling, where the payee wins the money, is void between the

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Argument of Counsel.

parties, under Bal. Code, § 7267, and it is immaterial whether it was won before or after it was advanced.

SAME — PROMISE TO PAY.

The subsequent promise of the loser to pay invalid checks given for money lost in gambling does not make the checks valid in the hands of any person with notice.

SAME — EVIDENCE — HARMLESS ERROR.

In an action to recover on checks given in payment of money lost in a gambling game with G., the introduction in evidence of the records in a police court wherein G. was convicted of conducting a gambling game, is harmless, where the fact was not disputed and was proven beyond question by other competent evidence.

EXECUTORS AND ADMINISTRATORS — CLAIMS AGAINST ESTATE — AFFIDAVIT.

A claim presented to an administrator for allowance must, under Bal. Code, § 6229, be accompanied by the original affidavit of the claimant, and a copy of the affidavit is insufficient.

GAMBLING — NEGOTIABLE INSTRUMENTS — BONA FIDE HOLDER.

In an action by an assignee of checks given for money lost in gambling, the jury is properly instructed that the plaintiff can not recover if he knew, when he purchased the checks, of the circumstances under which they were given.

Appeal from Superior Court, Spokane County.—Hon. WILLIAM R. BELL, Judge. Affirmed.

James Dawson and F. E. Langford, for appellant:

The statute only applies to securities given for money after it has been lost. *Boughner v. Meyer*, 40 Am. Rep. 139; *Shaw v. Clark*, 43 Am. Rep. 474; *Poorman v. Mills*, 39 Cal. 345; *Corbin v. Wachhorst*, 73 Cal. 411; *Roberts v. Blair*, 16 Pac. 717; *Hoyt v. Cross*, 14 N. E. 801; *Kinney v. Hynds*, 49 Pac. 403.

The statute against gaming is penal and should not be enlarged by intendment. *Shaw v. Clark*, *supra*; *McBlair v. Gibbs*, 17 How. 232 (15 L. ed. 132); *Armstrong v.*

Toler, 11 Wheat. 258 (6 L. ed. 468); *State v. Wilson*, 9 Wash. 16; *State v. Rand*, 12 Am. Rep. 127.

Negotiable securities for money lost at play are void in the hands of *bona fide* holders only when so expressly declared by statute. *Haight v. Joyce*, 2 Cal. 64; *New v. Walker*, 9 N. E. 386; *Vallett v. Parker*, 6 Wend. 615; *Somes v. Brewer*, 2 Pick. 191; *Boughner v. Meyer*, 5 Colo. 71 (40 Am. Rep. 139) *Printing Co. v. Sampson*, 19 Eq. 462; *Smith v. Columbus State Bank*, 9 Neb. 31-34; *Armstrong v. Toler*, 11 Wheat. 258; *Glenn v. Farmer's Bank* 70 N. C. 191.

The maker having stated that the checks were good and he would pay them, the purchaser is entitled to recover on the ground of estoppel. 1 Jones, Evidence, § 277, and authorities in note 6; *Patton v. Barnett*, 12 Wash. 576; *Barlow v. Tacoma*, 12 Wash. 32; *Moore v. Brownfield*, 10 Wash. 439; *Horn v. Cole*, 12 Am. Rep. 111; *Weyh v. Boylan*, 39 Am. Rep. 669; *Plummer v. Farmer's Bank*, 90 Ind. 386; *Vaughn v. Ferrall*, 57 Ind. 182; *Rose v. Hurley*, 39 Ind. 82; *McCabe v. Raney*, 32 Ind. 309; *Cloud v. Whiting*, 38 Ala. 57; *Lynch v. Kennedy*, 34 N. Y. 151; *Downer v. Read*, 17 Minn. 493; *Tobey v. Chipman*, 13 Allen, 123; *Quirk v. Thomas*, 6 Mich. 110; 16 Am. & Eng. Enc. Law, p. 795, subd. 3, and authorities cited in note 4; 21 Am. & Eng. Enc. Law (2d ed.), p. 588, and authorities cited in notes 5 and 6; *Haight v. Joyce*, 2 Cal. 64; *New v. Walker*, 9 N. E. 386; *Somes v. Brewer*, 2 Pick. 191; *Boughner v. Meyer*, 5 Colo. 71 (40 Am. Rep. 139); *Smith v. Columbus State Bank*, 9 Neb. 31, 34; *Glenn v. Farmer's Bank*, 70 N. C. 191; *Armstrong v. Toler*, 11 Wheat. 258 (15 L. ed. 132).

Any act estopping decedent, also estops his legal representatives. *McCabe v. Raney*, 32 Ind. 30; *McBlair v. Gibbes*, 17 How. 232 (15 L. ed. 132); *McDonald v.*

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Lund, 13 Wash. 412; *Bangs v. Hornick*, 30 Fed. 97; *English v. Young*, 10 B. Mon. 141; *Greathouse v. Throckmorton*, 7 J. J. Marsh. 16; *Jones v. Sevier*, 13 Am. Dec. 218; *Haight v. Joyce*, 2 Cal. 64; *Armstrong v. Toler*, 11 Wheat. 258 (6 L. ed. 468).

The question as to the consideration for the checks was one of fact for the jury. *White v. Barber*, 123 U. S. 392 (31 L. ed. 243); *West v. Marquar*, 78 Ill. App. 61; *Kirkpatrick v. Adams*, 20 Fed. 287.

Money loaned to pay a gambling loss may be recovered. *Bangs v. Hornick*, 30 Fed. 97; *Mitchell v. Catchings*, 23 Fed. 710; *Jones v. Sevier*, 13 Am. Dec. 218; *Haight v. Joyce*, 2 Cal. 64.

Mere knowledge that the same was to pay a gambling debt does not preclude a recovery. *Maulsby v. Wolf*, 14 Ind. 457; *David v. Ransom*, 1 G. Greene, 383; 14 Am. & Eng. Enc. Law (2d ed.), p. 643; *Sawyer v. Taggart*, 14 Bush, 727-734; *Wall v. Schneider*, 59 Wis. 352-359; *Clarke v. Foss*, 7 Biss. 540-558; *Lowe v. Young*, 59 Iowa, 364-371; *Favor v. Philbrick*, 7 N. H. 326.

Sullivan, Nuzum & Nuzum, for respondent:

The plaintiff cannot recover if he took any active part in the gambling contract. *Oliphant v. Markham*, 79 Tex. 543 (15 S. W. 569); *Sondheim v. Gilbert*, 117 Ind. 71 (18 N. E. 687, 5 L. R. A. 432); *Irwin v. Williar*, 110 U. S. 499 (28 L. ed. 225); *Embrey v. Jemison*, 131 U. S. 336 (33 L. ed. 172).

He was a holder in good faith without notice. *Fuller v. Hutchings*, 10 Cal. 523; *Dunn v. National Bank*, 90 N. W. 1045; *Maine Mile-Track Association v. Hammond*, 87 N. W. 135; *Drinkall v. Movius State Bank*, 88 N. W. 724 (57 L. R. A. 341).

If the checks were void the maker's promise to pay would not validate them. *Standard Furniture Co. v. Van Alstine*, 22 Wash. 670 (51 L. R. A. 889); *Reed v. Johnson*, 27 Wash. 42 (57 L. R. A. 404); *Dunn v. National Bank*, 90 N. W. 1045; *Morton v. Fletcher*, 12 Am. Dec. 366.

The opinion of the court was delivered by

MOUNT, J.—This is an action to recover upon two checks issued by one James Clark in his life time, for \$1,000 and \$500 respectively. The complaint contains two causes of action, one upon each check, and alleges, substantially, that the checks were given by James Clark, deceased, to defendant Green, and by Green sold and delivered to plaintiff in due course of business; the failure of Clark to pay; his death; the appointment of defendant Charlotte Clark as executrix and trustee; the presentation of the checks to her as such executrix and trustee, and her rejection thereof. Defendant Green did not appear in the case. The answer of Charlotte Clark, executrix, etc., in substance denied the execution and delivery of the checks for value, and denied the assignment of the checks to plaintiff. It admits the death of James Clark, the making of the will alleged, the appointment of Charlotte Clark as executrix and trustee of his estate, and the non-payment of the checks, but denies the presentation of the claim to her as required by law. For a further and separate defense, the answer alleges, in substance that, at the time the checks were issued, James Clark, deceased, was gambling with cards for money at a game unlawfully conducted by defendant Green; that the checks were issued by said James Clark and delivered to said Green for the sole and only consideration of chips and money to be used and which were used by

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said Clark in gambling at said game; that the amount thereof was lost by said Clark thereat, and that said checks represent money lost at said game to said Green; and that plaintiff, before the purchase thereof, had notice and knowledge of all the facts stated, and is not a holder thereof in good faith. In reply the plaintiff denied the allegations of the separate answer, and further alleged that before he purchased the checks he inquired of James Clark, deceased, if the checks were good, and that Clark thereupon informed him that they were good, and that he would pay the same. Plaintiff, relying upon the said promise, purchased the checks for value. Upon these issues the cause was tried before the court with a jury. The jury returned a verdict in favor of the defendant. From a judgment thereon, plaintiff appeals.

The errors assigned are based upon the refusal of the court to direct a verdict for the plaintiff, and also upon the introduction of certain evidence, and the giving and refusal of certain instructions, which will be referred to hereafter in this opinion. The principal question argued by the appellant is based upon the motion for a directed verdict, and is as follows: "Is the check given for money advanced to the maker by the holder thereof, which the holder knows will be used to gamble with, void, under § 7267, Bal. Code, between the original parties to the transaction?" It is not necessary to decide the exact question as above presented in this case, because the question is stated more strongly in favor of the appellant than the facts in the case warrant. It is not disputed that James Clark, deceased, issued the checks; that the defendant Green was, at the time the checks were issued, conducting a gambling game, which was prohibited by law; that the money was advanced by Green

to be played at the game; and that it was so played and lost by Clark, and won by Green. There is some dispute in the evidence as to whether the checks were given before any of the money was lost, or whether a part thereof was lost, and the remainder advanced when the checks were issued during the progress of the game. But assuming now that the money was all advanced before the checks were given, the question is as follows: Is a check issued for money advanced for the purpose of gambling, where the payee wins the money, void between the parties. Section 7267, Bal. Code, is as follows:

"All notes, bills, bonds, mortgages, or other securities, or other conveyances, the consideration for which shall be money or other things of value, won by playing at any unlawful game, shall be void and of no effect as between the parties to the same and all other persons, except holders in good faith without notice of the illegality of such contract or conveyance."

The appellant argues that the statute must be strictly construed; that, since it denounces contracts and security given for money after it has been won, but does not denounce such contracts and security for money advanced before it has been lost, the statute therefore does not apply to money lost after the contract or security has been given. It is true that the statute must be strictly construed, but it is also true that a reasonable construction must be given. The statute says all bills, the consideration for which shall be money won by playing at any unlawful game, shall be void. Money cannot be won at an unlawful game until it is lost by the loser. Where the winner takes a promissory note for money from the loser after the money is lost he is certainly within the terms of the statute. Where he takes a check under the same circumstances, there is no difference. Both are void and

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within the statute. If one advances money upon a promissory note, and then wins the money, the note certainly is for money won; it is given for money lost. The same is true of a check. Whether it is won before or after it is advanced is immaterial; the result is the same, and no reasonable distinction can be made. These checks were for money won by Green from Clark. The fact that Green took the checks before the money was lost by Clark made the checks no less obnoxious to the statute than if Green had credited Clark during the game, and subsequently taken the checks for the money won. The result was the same. Upon these facts the checks were certainly void as between Clark and Green. The subsequent promise of Clark to pay them to Green or to any other person with notice of their invalidity would not make them valid. *Reed v. Johnson*, 27 Wash. 42, 55 (67 Pac. 381, 57 L. R. A. 404).

It is urged as error that the court permitted the records of the police court in a case where Green was sentenced for gambling, and also a city ordinance making gambling a misdemeanor, to be introduced in evidence. This evidence was to prove that Green was conducting a gambling game, and that it was unlawful so to do. This class of evidence, if error, was harmless because it was proven by other competent evidence, beyond question, and was not even disputed, that Green was conducting a gambling game at the time the checks were issued. Moreover, this class of gambling was unlawful under the state law at the time.

There were but two questions presented to the jury for their consideration: (1) Were the claims presented for payment to the executrix as required by law; and

(2) was the plaintiff a *bona fide* holder in good faith? Upon these questions the court instructed the jury as follows:

"2. I charge you further, that, before the plaintiff in this case can recover, he must prove by a fair preponderance of the evidence that, prior to the bringing of this suit, the checks sued upon in this action were presented to the defendant, Charlotte Clark, and that the same were accompanied at that time by the affidavit of the plaintiff in this case, to the effect that the amount claimed was justly due the plaintiff, and that no payments had been made thereon, and that there were no offsets to the same, to the knowledge of the plaintiff.

"3. You are further instructed, that if you find that the only presentation of the claims sued upon by the plaintiff to defendant, prior to the commencement of this action, was a copy of the checks sued upon, accompanied with a copy of the affidavit of the plaintiff, to the effect that the amount sued upon was justly due, and that no payments had been made thereon, and that there were no offsets to the same to his knowledge, and at the same time that the copies referred to were presented and left with the administratrix, that the original claims were not presented or submitted to said administratrix, then you should find that there was no presentation of the claims sued upon by the plaintiff to the defendant prior to the commencement of this action, and your verdict should be for the defendant."

These instructions were excepted to, and the following was requested by the plaintiff and refused by the court:

"3. Even if you should find from the evidence that F. E. Langford did not exhibit the claims in evidence to the defendant, Charlotte Clark, but that he did demand payment of the same, and left copies thereof with the said defendant, and that she then and there said she was aware of the nature of said claims, and refused payment

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thereof, you are charged that this is a sufficient legal presentation."

The statute (§ 6229, Bal. Code) requires that:

"Every claim presented to the administrator shall be supported by the affidavit of the claimant that the amount is justly due, that no payments have been made thereon, and that there are no offsets to the same," etc.

It was held in *McFarland v. Fairlamb*, 18 Wash. 601 (52 Pac. 239) that it was not necessary under this requirement, that "the original note or instrument in suit" should be presented, but that a copy thereof attached to the affidavit was sufficient. But that case does not hold that a copy of an affidavit will be sufficient. The statute required an original affidavit to be presented. A copy of an affidavit does not answer the requirement. The instructions upon this point were therefore correct. The instructions given being correct, the one requested was properly refused.

The court upon the second question instructed the jury as follows:

"4. Under the law of this state, all bills, notes, bonds, mortgages, and other securities the consideration of which was money or other articles of value, won by gambling, are null and void and of no effect, as between the parties to the same, and to all other persons, except holders thereof in good faith, without notice of the illegality of such contract, and in this case you are instructed as a matter of law, that the checks in suit were invalid in the hands of Green, the original holder thereof, and if the plaintiff at the time he claims to have purchased them knew the circumstances under which and the consideration for which they were given, he cannot recover, and your verdict in this case must be in favor of defendants. On the other hand, if you find that at the time the plaintiff claims to have purchased these checks, he did not

know the circumstances under which they were given, nor the consideration for which they were given,—in other words, that he was an innocent purchaser in good faith, then your verdict must be for the plaintiff, for the full amount from the date you find that the claims were presented, as suggested by the court in previous instructions.”

The appellant excepted to this instruction, down to the words “on the other hand.” From what we have said on the first question discussed in this opinion, it follows that the portion of this instruction excepted to was properly given. There is no error in the record, and we are convinced that the verdict of the jury was correct.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4663. Decided July 30, 1903.]

MARY E. POLER, *Respondent*, v. EDWIN D. POLER,
Appellant.

DIVORCE — GROUNDS — SODOMY.

Sodomy is sufficient ground for divorce at common law and under Bal. Code, § 5716, authorizing a divorce on “any other cause deemed by the court sufficient.”

APPEAL — REVIEW — FINDINGS.

Findings in an action for divorce will not be disturbed on conflicting evidence, when the trial court saw and heard the witnesses.

SAME — EVIDENCE — REPUTATION OF DEFENDANT.

In an action for divorce it is not reversible error to exclude evidence of the good reputation of the defendant, when the same is not in issue and is conceded by plaintiff's witnesses.

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Appeal from Superior Court, Spokane County. Hon. GEORGE W. BELT, Judge. Affirmed.

Barnes & Latimer, for appellant:

The charge made was not cruelty. *Stanley v. Stanley*, 24 Wash. 463; *Cline v. Cline*, 10 Ore. 474; *Waldron v. Waldron*, 9 L. R. A. 487; *Smith v. Smith*, 57 Pac. 573.

Confessions in divorce cases are entitled to but little weight and the evidence of the act charged was insufficient. 2 Bishop, Marriage & Divorce (6th ed.) 240, 241; *Betts v. Betts*, 1 Johns. Ch. 198; *Clutch v. Clutch*, 1 N. J. Eq. 474; *Summerbell v. Summerbell*, 37 N. J. Eq. 605; 9 Am. & Eng. Enc. Law (2d ed.), 845; *McCulloch v. McCulloch*, 8 Blackf. 60; *True v. True*, 6 Minn. 458.

The court erred in excluding evidence of defendant's good character. *Townsend v. Graves*, 3 Paige, 455-456; *Ruan v. Perry*, 3 Caines, 120; *Daniels v. Dayton*, 49 Mich. 137 (13 N. W. 392); *Werts v. Spearman*, 22 S. C. 200; *Falkner v. Behr*, 75 Ga. 671; *Downey v. Dillon*, 52 Ind. 452; *Stafford v. Stafford*, 41 Tex. 118; *Barber v. Root*, 10 Mass. 264; *Matchin v. Matchin*, 47 Am. Dec. 467; *Garrat v. Garrat*, 4 Yeates, 244.

Connor & Hand, for respondents.

The opinion of the court was delivered by

MOUNT, J.—A decree of divorce was granted by the court below in favor of the plaintiff. Defendant appeals, and seeks a reversal upon three grounds, stated in the brief as follows: "1. The charge made is not a ground for divorce. 2. The evidence was insufficient to prove the act charged. 3. The court erred in not allowing defendant to prove his good reputation as a law-abiding and moral man in the community where he resided."

1. On the first ground stated, appellant argues that the cause for which the divorce was granted is not one provided for by statute. The cause stated and found by the court was that of sodomy. It is true no such cause for divorce is specifically stated in the statute, but it provides, after enumerating certain well-known and recognized causes, as follows:

“A divorce may be granted upon application of either party for any other cause deemed by the court sufficient, and the court shall be satisfied that the parties can no longer live together.” § 5716, Bal. Code.

An act of sodomy was directly and specifically charged in the complaint as one ground for divorce. Sodomy has always been regarded, by both the ecclesiastical and common-law courts, as ground for divorce. Bishop in his work on Marriage, Divorce and Separation, at §1830, (Vol. 1), says:

“The books are not clear whether, under the unwritten law it is to be regarded as aggravated adultery, or as cruelty, or as independent cause for divorce.”

See, also, Schouler, Domestic Relations (4th ed.), § 220b; Schouler, Husband and Wife, § 525; 9 Am. & Eng. Enc. Law (2d ed.), pp. 747, 764. Under the statute above quoted, we think this offense is certainly one for which the court may grant a divorce, though not specially mentioned therein. The complaint and findings based thereon were, therefore, sufficient.

2. We have carefully examined the evidence in the record. It is somewhat conflicting, but we are not disposed to disturb the findings of the trial judge, who saw and heard the witnesses.

3. There is no merit in the last ground urged for reversal. The general reputation of the appellant as a law-

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abiding, moral man was not an issue in the case. But, if it were, the plaintiff's witnesses on cross-examination stated that his reputation was always good, and nothing had been heard against it up to the time of this case. So that this fact, not being questioned by the respondent, is presumed in his favor. Furthermore, this is only a circumstance in the case, and not conclusive as a defense. For this reason, even if the lower court had found in favor of the defendant upon this question, this court would not reverse the case upon that ground alone.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4696. Decided July 30, 1903.]

F. M. POWELL, *Respondent*, v. SUSIE A. NOLAN *et al.*,
Respondents, and JAMES NOLAN, *Appellant*.

APPEAL — FINAL ORDERS.

An order denying a motion to quash the service of a summons is not a final order or one that in effect determines the action, and is not appealable.

Appeal from Superior Court, Spokane County. Hon. GEORGE W. BELT, Judge. Appeal dismissed.

Gleeson & Stayt, for appellant.

Danson & Huneke, *John A. Peacock* and *Stephens & Bunn*, for respondents.

The opinion of the court was delivered by

MOUNT, J.—This is an appeal from an order denying a motion, made upon special appearance, to quash a service

of summons. Respondents moved to dismiss the appeal upon the ground that the order is not an appealable order under the statute. The statute (§ 6500, Bal. Code) does not provide for appeals from orders of this kind. It provides for appeals from final judgments and:

“6. From any order affecting a substantial right in a civil action or proceeding, which either, (1) in effect determines the action or proceeding and prevents a final judgment therein; or (2) discontinues the action; or (3) grants a new trial; or (4) sets aside or refuses to affirm an award of arbitrators, or refers the cause back to them;

“7. From any final order made after judgment, which affects a substantial right. . . .”

The record in this case does not disclose any final judgment. It shows the entry of a default against the appellant, and nothing more. So far as the record shows, no final judgment has yet been entered against appellant. The order denying the motion to quash the service of the summons is not an order affecting a substantial right, which determines the action or proceeding and prevents a final judgment therein. The appellant may, upon motion, have the default set aside, or, if the default is not set aside, he may appeal from the final judgment entered upon default within the statutory time, and then raise the questions presented here, that the court has no jurisdiction because there has been no service of summons. *Rhode Island Mtge. & Trust Co. v. Spokane*, 19 Wash. 616 (53 Pac. 1104). In *Prussian National Ins. Co. v. Northwestern F. & M. Ins. Co.*, 19 Wash. 281 (53 Pac. 158), it was held that an order denying the motion to quash the service of summons was not appealable, because it was not such a final order as determined the action. It is not the policy of the law to permit appeals where the order is not final, and thus allow a case to be brought here

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Syllabus.

piecemeal. But the object of the statute is to require causes to be brought up all at one time after final judgment, and to that end it expressly provides that "an appeal from any such order shall also bring up for review any previous order in the same action or proceeding which involves the merits and necessarily affects the order appealed from." This not being a final order, or one which in effect determines the action and prevents a final judgment, it is not appealable.

The appeal is therefore dismissed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4588. Decided July 31, 1903.]

WALTER L. EASSON, *Respondent*, v. CITY OF SEATTLE *et al.*, *Appellants*.

32 405
30 379

MUNICIPAL CORPORATIONS — OFFICERS — REMOVAL.

Under Seattle City Charter, art. 16, § 12, providing that any officer "may be removed by the appointing power only upon filing" with the civil service commission written charges, which may be investigated, and, if not sustained by the commission, the officer is to be reinstated, and art. 24, § 8, giving each officer the power to remove any employee appointed by him, unless otherwise provided, the civil service commission has no power to remove the night clerk in the police department, appointed by the chief of police from among applicants who had passed the civil service examination, the chief of police having declined to make the removal.

SAME.

Acquiescence by the chief of police in such removal by the civil service commission does not deprive the clerk of his office.

SAME.

The power of removal is inherent in the appointing power unless otherwise clearly provided by statute.

SAME.

The civil service commission of Seattle is not vested with any actual power of appointment or removal, its functions being

to prescribe tests of fitness, and to act as a check upon improper removals.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Mitchell Gilliam and *William Parmerlee*, for appellants.

Shepard & Lyter, for respondent.

The opinion of the court was delivered by

HADLEY, J.—On and prior to November 25, 1901, the respondent was an employee of the city of Seattle, appointed and qualified under its civil service rules and regulations, in the capacity of night clerk in the police department of said city. He claims that he is still such officer, and entitled to exercise his functions as such. The appellants Randolph and Zimmerman, together with one Hughes, on the date named above, constituted the civil service commission of the city of Seattle, and the appellant Sullivan was at the same time chief of police of said city. On or about said date complaint was made against respondent before said civil service commission, charging him with the maltreatment of one Dickinson and others. Said commissioners thereupon proceeded to conduct an investigation, and cited respondent and others to appear before them. During the time of such investigation and afterwards, the said commissioners claimed and assumed to have absolute and discretionary power to dismiss any employee of said city who was appointed and admitted to its service under the civil service regulations, if in their opinion such employee had been guilty of any act properly calling for his dismissal. After completing the investigation aforesaid, the said commissioners, in

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consequence thereof and because of their opinion concerning the matter investigated, assumed and attempted to dismiss respondent from the service of the city as a police officer thereof, and did order his dismissal. Prior to said investigation by the commission, the appellant Sullivan, as chief of police, had, upon complaint made to him, investigated the same matter, and, having concluded therefrom that no sufficient ground for the dismissal of respondent existed, refused to dismiss him. However, after the said investigation and attempted dismissal by the commissioners, the chief of police acquiesced therein, but neither then nor at any time since did he dismiss or suspend respondent. He seems to have assumed that the action of the civil service commission was legal, and simply treated respondent as no longer a member of the police force. Respondent brought this action against the appellants, and, having alleged in his complaint facts substantially as stated above, prayed for a mandatory injunction against appellants compelling them to reinstate him in his said office, to recognize him as an employee of said city, and also commanding them not to interfere with him in the discharge of his duties as such police officer. He also asked for judgment against the appellant, the city of Seattle, for the amount of his customary and established salary since the date of the attempted dismissal. A demurrer to the complaint was overruled, and appellants thereupon answered. The answer does not controvert the material facts, but avers that the action of the civil service commission was regular, and that respondent was thereby removed as an officer. The cause was tried before the court without a jury, and judgment was entered to the effect that respondent has been an officer and employee of said city ever since said November 25, 1901, in the

capacity of night clerk of the police department, and that he is entitled to exercise the functions and discharge the duties thereof. It was adjudged that he should be reinstated to the possession of his office, and the appellants were each and all enjoined from in any manner interfering with him in the performance of his duties as such officer. The decree also recites that it is made without prejudice to respondent's right to maintain an appropriate action in his own behalf for the recovery by him of any unpaid salary to which he may be entitled from said city on account of his incumbency of said office. This appeal is from that judgment and decree.

At the hearing in this court all questions as to whether respondent had adopted the appropriate remedy in the premises were waived. We shall therefore discuss and determine only the merits of the case. The question to be determined is, has the civil service commission of the city of Seattle power to dismiss or remove an employee in the classified service of the city, whose official appointment was made by the head of the police department of the city government. We are referred to § 12, art. 16 of the charter of the city of Seattle, which is as follows:

"Every officer or employee in the classified civil service shall hold office until removed or retired. Any officer or employee in such service may be removed by the appointing power only upon the filing with the commission of a statement in writing of the reasons therefor. Any officer or employee so removed may, within ten days after his removal demand an investigation. The commission shall forthwith make such investigation and its finding and decision shall be certified to the appointing officer, and if the removal is not sustained thereby, the officer or employee so removed shall at once be reinstated. Nothing in this article shall limit the power of an officer to suspend without pay a subordinate for a period not exceeding thirty

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days. In the course of any investigation each member of the commission shall have the power to administer oaths, and to require the attendance of any officer or employee or other person and the production of books and papers relevant to such investigation. The provisions of this section shall not apply to the removal of the chief of police."

Appellants state in their brief that the court below reached the conclusion, from a consideration of the above section, that the sole authority to dismiss is vested in the chief of police. They insist, however, that the trial court's interpretation of the language of the section is erroneous. It will be observed that the following sentence appears in the section: "Any officer or employee in such service may be removed by the appointing power only upon the filing with the commission of a statement in writing of the reasons therefor." Appellants reason that the entire section relates to the removal of an employee by the appointing power, and that the word "only" in the sentence last quoted relates solely to the manner of removal, and does not exclude the right of removal by other corporate authorities. On the other hand, respondent reasons that the sentence provides for removal by the appointing power "*only*," and that such removal may be effected by filing with the civil service commission a statement in writing of the reasons actuating the head of the department in making the removal; that the remainder of the section gives the commission power to *review* the action of the removing power, and, unless his action be sustained by the commission, the removal shall not become effectual. It is contended that, if the commission were given authority in the first instance to remove, it would not have had imposed upon it the duty to review; that, since removals can be made by the "ap-

pointing power only," and as the commission is not given the power of appointment, it follows that it cannot be referred to as the "appointing power." Respondent further argues that, if the word "only" were intended to qualify the clause following it, as contended by appellants, then it might have been omitted from the sentence, since its use in that sense adds neither force nor meaning to what follows it, while under the other interpretation the word becomes a necessary one. The rule is invoked that, when the words of a statute are susceptible of two interpretations, that one will be adopted which renders necessary the use of each word, and which gives to each word some force and effect, rather than that construction which renders useless a portion of the language employed. Endlich, Interpretation of Statutes, § 23. We think the reasoning of respondent is the more conclusive when tested by the above rule, and we believe the interpretation given by the trial court to said section of the city charter is the correct one.

We are referred to other sections of said art. 16 of the charter as authorizing removals by the civil service commission, but we think they cannot be so construed when considered in connection with said § 12. Section 4 provides that the commission "shall make rules to carry out the purposes of this article, and for examinations, appointments, promotions and removals in accordance with its provisions." It is argued that, since the above authorizes the commission to make rules for removals, it follows that the power of removal resides in the commission. It will be observed that the rules so made shall be for removals in accordance with the provisions of the whole article, and, as we have seen, another portion of the article provides for removal by the appointing power.

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A reasonable interpretation of the provision regarding rules is that such rules shall pertain to the method of investigation by the commission, as authorized by said § 12, when a removal has been ordered by the appointing power. Other sections referred to by appellants, we think, show no authority in the commission to make removals. Upon the other hand, respondent cites § 8 of art. 24 of the charter, which provides as follows:

“Unless otherwise provided by law or this charter, each officer, board or department authorized to appoint any deputy, clerk, assistant, or employee, shall have the right to remove any person so appointed.”

Since we are not shown any provision which seems to authorize removal by the commission, the above section, in connection with § 12, *supra*, appears to be conclusive that the power of removal is lodged with the head of the department who makes the appointment.

The right of removal inheres in the right to appoint, unless limited by constitution or statute. *Shurtleff v. United States*, 189 U. S. 311 (23 Sup. Ct. 535).

The above cited case is a very recent one, and was decided April 6, 1903. The case involved the power of the president to remove an officer, appointed by him with the advice and consent of the senate, for any cause not specified by act of Congress. The officer had been removed by the president without notice or opportunity for a hearing. It was contended that he could not be removed without such opportunity. It was held, if his removal had been sought on any of the grounds specified by Congress, he was entitled to such hearing before he could be removed, but that the power of the president to remove for other causes than those named by Congress and deemed by him to be sufficient inhered in the power of appointment, although it was made by and with the

consent of the senate. The following excerpts from the opinion in that case seem to be in point here:

"It cannot now be doubted that in the absence of constitutional or statutory provision the president can by virtue of his general power of appointment remove an officer, even though appointed by and with the advice and consent of the senate. . . . The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away. . . . The right of removal, as we have already remarked, would exist as inherent in the power of appointment unless taken away in plain and unambiguous language. This has not been done, and although language has been used from which we might speculate or guess that possibly Congress did intend the meaning contended for by appellant, yet it has not in fact expressed that meaning in words plain enough to call upon the courts to determine that such intention existed."

It is thus held that the power of removal inheres in the power of appointment, and further that it cannot be taken away except by the use of plain and unambiguous statutory language. As we have seen, the city charter of the city of Seattle contains no language that can be said to be so plain and unambiguous that it takes the power of removal from the appointing officer and vests it in the civil service commission.

The object of the civil service regulations seems to be to provide a system for the selection of capable officers, uninfluenced by mere personal or political consideration. The test of efficiency is usually made by a system of examinations such as the civil service commission of the city of Seattle is authorized to conduct. These examinations relate to intellectual qualifications, and perhaps in some measure to other fitness in the way of personal

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character. As the result of the test the commission prepares lists of names of those found to be qualified, and from such lists the appointing officer selects and appoints. The function of the commission seems to be to make the test of fitness, and to that extent it may be said to recommend the appointment of any persons whose names are included in the lists it prepares; but the actual appointment made is made by another. A further function of the commission under the charter of the city of Seattle seems also to be that it shall act as a sort of check upon the appointing officer if he shall seek to make removals based upon mere personal, political, or other insufficient motives. When, therefore, he has filed with the commission his reasons in writing for the removal of any officer, the commission shall proceed to investigate the reasons, and if they are found insufficient the removal shall not be made. Thus the functions of the commission are such that the members thereof are evidently intended to be free from any considerations in connection with either appointments or removals, except those which are purely meritorious. That they may the more fully discharge their duty in that spirit, they are not given the power of either actual appointment or removal. They are authorized to conduct investigations into the conduct of officials, and for that purpose may compel the attendance of witnesses. Under the heading of "Penalties" it is provided in § 29 of art. 16 of the charter, that any officer who has been convicted, after a trial before the commission, of willfully violating any of the provisions of the article, shall be dismissed from the service and shall not be subject to re-appointment. Appellants ask, who shall dismiss such officials, if not the commission? The answer must be that the appointing officer must dismiss, and, if he should decline to

do so, doubtless some remedy could be found to compel him to act. The action of the commission is in the nature of a finding of unfitness, and constitutes a basis for action by the removing power. But the power of removal is not granted to the commission by the mere fact that it may investigate and make findings thereon.

The chief of police, who alone had the power to remove respondent, did not remove him, but declined to do so after investigating the matter. The civil service commission declared that he was removed by its action. The chief of police acquiesced in the action of the commission to the extent of not assigning respondent to duty, but he did not remove him.

The judgment must therefore be affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and DUNBAR, JJ., concur.

[No. 4561. Decided August 1, 1903.]

L. C. SMITH *et al.*, Respondents, v. E. B. WHITE *et al.*,
Appellants.

SUMMONS—SERVICE BY PUBLICATION—SUFFICIENCY.

Under Laws 1901, p. 384, § 1, subd. 2, authorizing service by publication in proceedings to foreclose tax liens, wherein the owner of the property shall be directed to appear within sixty days after the date of the first publication (exclusive of the first day) and defend the action, publication requiring defendant to appear "within sixty days after the service of this notice and summons" was not a compliance with the statute, and hence failed to give the court jurisdiction.

Appeal from Superior Court, King County. — Hon. BOYD J. TALLMAN, Judge. Reversed.

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| 32 | 414 |
| 32 | 503 |
| 32 | 414 |
| 35 | 279 |
| 32 | 414 |
| 37 | 180 |
| 38 | 649 |
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| 41 | 644 |

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Argument of Counsel

S. S. Langland, for appellants:

It is the universal rule that a summons in an ordinary civil action, or notice or citation which takes the place of the summons, must conform to the requirements of the statute as to form and contents. Such requirements are mandatory and failure to so comply is fatal. *Black v. Clendenin*, 3 Mont. 48; *Kellar v. Stanley*, 5 S. W. 477; *Craighead v. Martin*, 25 Minn. 43; *Lyman v. Milton*, 44 Cal. 630; *Durham v. Betterton*, 79 Tex. 223 (14 S. W. 1060); *Ames v. Sankey*, 21 N. E. 579; *Sidwell v. Schumacher*, 99 Ill. 426; *Eagan v. Connelly*, 107 Ill. 458; *Calkins v. Miller*, 75 N. W. 1108; *Kendall v. Washburn*, 14 How. Pr. 380; *Hays v. Lewis*, 21 Wis. 663; *Moore v. Williams*, 44 Miss. 61; *Odell v. Campbell*, 9 Ore. 298; *Jones & M. L. Co. v. Boggs*, 19 N. W. 678; *Fernekes v. Case*, 75 Iowa, 152.

Walter S. Fulton and *William C. Keith*, for respondents:

As to the sufficiency of the notice and summons, it seems impossible that the defendants could have been misled or prejudiced. Unless there was a substantial variance of the notice and summons as published, within the requirements of the statutes, it seems that there could be no merit in the claim that the appellants were prejudiced by the failure to incorporate in the body of the summons the date of the first publication. *Shinn v. Cummins*, 65 Cal. 98; *Ralph v. Lomer*, 3 Wash. 401; *Granger v. Sheriff*, 65 Pac. 873; *Block v. Kearney*, 64 Pac. 267; *Donald v. Bradt*, 62 Pac. 580; *Tootle v. Ellis*, 65 Pac. 675; *Nix v. Gilmer*, 50 Pac. 131; *Miller v. Zeigler*, 5 Pac. 518.

The opinion of the court was delivered by

HADLEY, J.—Respondents, as the holders of certain tax certificates, brought foreclosure suit thereon, making appellants, as owners of the land, defendants, and obtained judgment June 28, 1901. On April 25, 1902, appellants appeared specially and moved the court to vacate said judgment and purge the record thereof, on the ground that the court had no jurisdiction to enter the judgment, for the reason that no summons or notice was ever served on either of the appellants. Service of summons was attempted by publication, but the notice, as published, contained the following as to the time for appearance:

“You, and each of you, are hereby directed and summoned to appear within sixty days after the service of this notice and summons upon you, exclusive of the day of service, in the above entitled court, and defend the action or pay the amount due, together with costs.”

It will be observed that the time named for appearance is sixty days after the service of the summons, instead of sixty days after the date of the first publication, exclusive of said day, as provided by statute. Laws 1901, ch. 178, §1, subd. 2, p. 384. In *Thompson v. Robbins*, ante, p. 149 (72 Pac. 1043) a tax publication summons containing the same direction as to the time for appearance as that above set out was considered. In that case judgment by default had been entered, and the defendants in the action thereafter moved the court to open the default judgment and permit them to defend the action. The motion was made upon the same ground as that urged in the case at bar, and on the further ground that the defendants had a valid defense to the action. The plaintiffs in the action demurred to the motion on the ground that it did not state facts sufficient to entitle the defendants to the relief for which they prayed. The demurrer was overruled. The motion to open the de-

fault judgment was sustained, and the defendants permitted to answer. From that ruling the plaintiffs in the action appealed. The appeal was dismissed here for the reason that the order sought to be reviewed was not an appealable one, within the rule frequently held by this court—that an order vacating the judgment and permitting defendants in the action to answer and defend is not a final one, and that such order may be reviewed on appeal from the final judgment that may be afterwards entered in the action. It might be insisted, in view of the dismissal of that appeal, that the appealability of the order was the only question actually decided in the case. It, however, appeared that the court below had regarded its default judgment as merely irregular, for having been entered before the expiration of the time within which the defendants had the right to appear and answer. The first publication of the summons was on February 23, and the last March 30. The judgment was entered April 8 of the same year. Under any view of the summons the judgment was at least irregular, for having been entered forty-three days after the first publication of the summons. For the future guidance of the trial court it was, however, thought proper to declare our view upon the summons, inasmuch as that view made the judgment void, and not merely irregular. The summons had been issued a few days before the above cited law of 1901 took effect, and this court, inadvertently overlooking that fact, argued upon the theory that it had been issued after that law was in force. But it was nevertheless true that the summons did not state any date for the first publication, and that the time for appearing was therefore so indefinite that it did not amount to a summons. The conclusion that the summons was not such as to give the court jurisdiction to enter even an irregular judgment was, therefore, in any event, correct,

even though it might in other respects have conformed to the law in force at the time it was issued. The reasoning in that case was intended to be directed to a summons in all respects like the one now before us. This summons was issued after the 1901 law took effect. It provided for an appearance sixty days after "service of this notice and summons." The statute did not authorize such a notice. In *Thompson v. Robbins, supra*, in connection with the stated reasons, we said of such a summons:

"This summons was not in accordance with the statute and its publication did not confer upon the court jurisdiction to render the judgment which was entered in the foreclosure proceeding. And the judgment was therefore not merely irregular but void."

We here refer to the reasoning of that case on the subject of the summons, and now adopt it as decisive of the case at bar. It follows that the judgment entered below was void, and that appellants' motion to vacate the judgment and purge the record thereof should have been granted.

The judgment is reversed and the cause remanded, with instructions to the lower court to grant said motion.

FULLERTON, C. J., and ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4183. Decided August 4, 1903.]

THE TITLE GUARANTEE AND TRUST COMPANY, *Appellant*,
v. MARGARET McDONNELL *et al.*, *Respondents*.

VENDOR AND PURCHASER — CONTRACT OF SALE — CONDITIONAL OR
ABSOLUTE — CONSTRUCTION.

A contract for the sale of land should be construed as conditional and not absolute, when its terms provided that the ven-

dor should convey to the purchaser the lands described on payment of the taxes due and to become due, the principal and interest of a certain mortgage then a lien on the premises, and a sum which, together with such payments, would make \$20,000, to be paid in installments at fixed times; that the purchaser should pay the taxes then due on or before a certain date, but expressly exempting him from agreeing to make any of the other payments; that, if any one payment is not made when due, all previous payments shall be forfeited at the option of the vendor, but should not "affect the parties as to any of said land already sold and conveyed," under an agreement contained in the contract which provided that the vendor would convey to third parties certain of the lands on payment by the other party to the contract of a fixed price per acre according to location; the rate for the entire contract in case of a consummation of sale by the purchaser being about \$90 per acre, while the agreement for sale in parcels fixed a rate ranging from \$125 to \$300 per acre.

SAME — NOVATION — TRUST AGREEMENT — EFFECT.

A contract between an owner of land and another provided in effect for a sale of the entire tract at a specified price, payable in installments, with condition of forfeiture, and that, on payment to the vendor or application on a mortgage on the premises, any parcel of a certain portion would be conveyed to any one designated by the purchaser. Thereafter the vendee assigned his contract to a trust company, which for a consideration was to carry out the vendee's plans and contracts. Subsequently judgments were entered against the vendor, preventing the free transfer of the property, and a contract was executed between the trust company and the vendor, which was denominated "a declaration of trust." It recited the other contracts, that the trust company should be made "trustee" of the vendor, and that the lands had been conveyed to it; provided for a forfeiture in case the trust company should not collect moneys growing due under sales made by it to third parties; required a cash payment by the trust company to the vendor and the satisfaction of the judgments from moneys coming due under the original contract; and provided for the payment of certain damages claimed against the original purchaser. Subsequently it was found necessary to arrange for releases by the mortgagee of parcels sold, and a party was procured to purchase the mortgage. All four parties then united in a contract, reciting all the others, designating the trust company as "trustee" for the vendor, and providing for

releases of the parcels sold as contemplated by the first contract on payment of specified sums per parcel. *Held*, that the trust company did not become a mere trustee as to the vendor, and entitled to compensation for its services, but stood in the place of, and had the same rights and privileges as, the purchaser.

Appeal from Superior Court, Clarke County.— Hon. ABRAHAM L. MILLER, Judge. Reversed.

E. B. Seabrook, Covert & Stapleton and *W. W. Cotton*, for appellant.

Milton W. Smith and *N. H. Bloomfield*, for respondents.

The opinion of the court was delivered by

FULLERTON, C. J.—On February 12, 1894, Columbus McDonnell and Margaret McDonnell, who were then husband and wife, were the owners of 391.48 acres of land situate in Clarke county, in this state, all of which was suitable for the culture of prunes. The land was incumbered by a mortgage made by the owners to Balfour, Guthrie & Company, nominally for a larger amount, but upon which there was then owing the sum of \$14,945, and some accrued interest. Very little of the land was under cultivation; some 140 acres being in timber and a large portion of the remainder being only partially cleared. It had at that time growing upon it some sixteen acres of prunes, known in the record as the “10-acre 3-year-old orchard,” the “4-acre 3-year-old orchard”, and the “2-acre old orchard”. While the land was in this condition the Stearns Fruit Land Company, a corporation, conceived the idea of purchasing the land, planting it to prunes, dividing it into small lots, and selling the lots at a greatly enhanced price on the installment plan, with small periodical payments, covering a long period of time. To that end it entered into a written agreement with the owners of the

property, under date of February 12, 1894, reciting the ownership of the land by the McDonnells, the fact that it was subject to a mortgage to Balfour, Guthrie & Company, that the mortgagees had agreed to release such portions of the land as might be sold under the agreement then being entered into, and continued as follows:

"Now this agreement witnesseth: That said parties of the first part [McDonnells], in consideration of the covenants and agreements of the party of the second part herein contained, hereby covenant and agree to and with said party of the second part, as follows:

"That upon the payment by said party of the second part, of the taxes now due against said land upon or before the first day of April, 1894, and of all taxes hereafter accruing during the existence of this agreement and of all interest hereafter accruing or earned or falling due by virtue of said mortgage and of the payment in the times and manner hereinafter specified, of the amount of the principal of said mortgage, and in addition thereto of the sum of \$20,000.00 payment of same to be made at the rate of an amount equal to \$20.00 per acre on the whole of said land upon or before January 1, 1895, but payments made of taxes due now, and back interest to date are to be first deducted from the amount so to fall due, and the further sum of an amount equal to \$10.00 per acre on the whole of said land on or before the first day of January for five years thereafter, said payments falling due upon the first day of January in the years 1896, 1897, 1898, 1899 and 1900; and a final payment of the remainder of said sum upon or before the first day of April, 1900, no interest on deferred payments, that the parties of the first part will thereupon make, execute and deliver to said party of the second part, their successors or assigns, a good and sufficient warranty deed or deeds to the whole of said tract of land as a whole or in such parcels or tracts as the said parties of the second part shall desire.

"It is hereby expressly understood and agreed that said party of the second part agrees to make payments of said

taxes now due against said land upon or before the first day of April, 1894, but it does not agree to make any of the other payments herein specified—time is expressly made of the essence of this contract—and failure for thirty days to make any of said payments at the times herein specified, shall, at the option of said parties of the first part, work an absolute forfeiture of this agreement, and of all moneys theretofore paid by said party of the second part thereunder, without process of law, save as to the last payment due hereunder, as to which three months' grace shall be allowed, and thereafter said party of the second part shall have no right under this agreement, but no such forfeiture shall in any wise affect the parties as to any of said land already sold and conveyed.

"It is expressly agreed that said parties of the first part will at any time, and from time to time, hereafter make and execute to such person or persons as said party of the second part shall make sale to, of any parcel or parcels of said land lying south of the Mill Plain Road, a good and sufficient deed of general warranty, conveying title upon receiving payment either to themselves, or applied in payment of said mortgage against the premises, at the following rates therefor, viz.: not less than \$200.00 per acre for the 10-acre 3-year old prune orchard; not less than \$200.00 per acre for the 4-acre 3-year-old prune orchard; and not less than \$300.00 per acre for the 2-acre old orchard, with house and barn and \$125 per acre for the balance of the cleared and cultivated land; upon such sale of any of said parcels of land, possession shall be immediately given to the purchaser, save as to any cleared land then in annual crop, between March 1st and October 1st, in any year as to which possession shall be given as soon as crop is harvested or at furthest on October 1st following.

"It is further hereby expressly agreed that said party of the second part shall have the right to enter upon any part of said land, at any time, and clear the same; or to plant the same to fruit trees, between the first day of October, and the first day of March, in any season; and thereafter said party of the second party shall retain full

possession and control of any such tract so planted, but until said party of the second part shall make sale of said land as above provided for or shall enter upon the same to plant the same, to fruit as above provided, said parties of the first part, shall remain in the full and undisturbed possession thereof, until the completion of this contract.

"This contract does not in any wise relate to or affect the growing crop now on said land, or any of the stock or other personal property thereon;

"In Witness Whereof," etc.

Between the date of the foregoing agreement and June 21st, following, the Stearns Fruit Land Company surveyed and platted the land into small lots, principally of five acres each, and placed the same on the market for sale under a guaranty contract to the effect that the company would plant the lot to prune trees during the first planting season after the date of the contract of sale, keep the same in a good state of cultivation, and have growing thereon of bearing age not less than a certain number of fruit trees per acre at the date of the maturity of the contract, further guarantying that when final payment should be made by the purchaser the lot should be deeded to him free from liens of every nature, and, by August 24, 1894, had contracted to sell some 309 acres of the land at prices aggregating \$92,700, \$6,660 of which it had received in cash. Feeling the necessity of being prepared to comply with the contracts under which it had promised to convey these lands, the Fruit Land Company reduced its agreement with Balfour, Guthrie & Company to writing, the McDonnells joining therein, under date of June 21, 1894. By this agreement the mortgagees agreed to extend the time of payment of the principal notes secured by their mortgage, and accept part payments thereof from time to time, if made in sums of not less than specified amounts, further agreeing to release from the operation of their mortgage

any single lot into which the Fruit Land Company had platted the land on the payment to them, to be credited on the mortgage, the value of the lot at a fixed price per acre according to a certain schedule attached to this agreement; the minimum price being \$125 per acre, and the maximum \$300.

On August 28, 1894, the Stearns Fruit Land Company sold and assigned to the appellant its interest in the lands, together with its interests in the several outstanding contracts entered into for the sale thereof, as well as its interests in and to the several agreements heretofore referred to, subject however to the conditions of the following agreement entered into between the parties at the time of the assignment:

"This Agreement made and entered into this twenty-eighth (28th) day of August, 1894, by and between The Title Guarantee and Trust Company, party of the first part, and the Stearns Fruit Land Company, party of the second part, both of the parties hereto being corporations duly incorporated, organized and existing under the laws of the State of Oregon.

"Witnesseth: That Whereas, said party of the second part has this day assigned, transferred and set over unto the said party of the first part a certain contract made between the said party of the second part and Columbus Mc Donnell and wife of the State of Washington, bearing date February 12, 1894, and recorded in Book 21 of the Records of Deeds of Clarke County, Washington, on page 270 thereof, by virtue of which contract said McDonnell and wife agree to convey to the said party of the second part herein certain lands upon terms therein specified, and

"Whereas, the said party of the second part has likewise this day transferred to the party of the first part a certain contract supplemental to the last mentioned contract and made between the party of the second part hereto and Robert Balfour, Robert Brodie Forman and Alexander Guth-

rie, the said Columbus McDonnell and wife consenting thereto, and

“Whereas, the party of the second part has also this day assigned to the party of the first part certain applications for the purchase of lands made by certain parties with the said party of the second part hereto, which applications have been made by the said parties on the understanding that the lands referred to in the said applications should be selected by the said applicants therefor under the Home Guarantee Contract plan of the party of the second part, from lands described in the aforesaid agreements with Mc Donnell and wife and Balfour, Forman and Guthrie, a schedule of which applications showing the names of the persons applying for such contracts, the payments made and to be made thereon, being hereto annexed and marked ‘Schedule A’ and made a part of this agreement, and a form of the said Home Guarantee Contract being also hereto annexed and marked ‘Schedule B’ and made a part of this contract.

“Now This Agreement Witnesseth, that the said party of the first part hereto shall and will hold all of the said contracts so transferred to it and the interest acquired by the party of the second part in the lands described in the aforesaid contracts, upon the following trusts:

“Upon the express understanding and agreement, however, that the party of the first part shall by the acceptance of any or all of the said contracts, incur no liability whatsoever for the payment of the sums of money covenanted by the party of the second part to be paid in the agreements with McDonnell and wife and Balfour, Forman and Guthrie, and no liability to the purchasers of any of the said lands by reason of inability to give title to the same unless the said failure shall result from default of the party of the first part; and it is further agreed between the parties that the party of the first part shall incur no liability by the acceptance of the said contracts aforesaid to the purchasers aforesaid by reason of the failure of the party of the second part to fulfill or perform any or all

of the covenants assumed by it in its agreements with the said purchasers. The trusts aforesaid are as follows:

"A. To receive all moneys paid in pursuance of such applications and the Home Guarantee Contracts thereby applied for, and which may hereafter in pursuance of said applications be issued to said parties by said Stearns Fruit Land Company upon the completion of the first payment called for by said applications.

"B. To pay out the moneys so collected by it in each year for the following purposes:

"First: In the payment of all moneys falling due as the same shall fall due under the said agreements with Columbus McDonnell and wife, to the said Robert Balfour, Robert Brodie Forman and Alexander Guthrie, and the payment of all taxes upon the property described in the aforesaid agreements, the payments made to the said Balfour, Forman and Guthrie to be payments in satisfaction in whole or in part of the mortgage by them held, and as payments upon the particular tracts of land which may be designated by the party of the second part hereto, a schedule of the payments falling due to the said McDonnell and to Balfour, Forman and Guthrie, being hereto attached and marked 'Schedule C.'

"Second: In payment of all expenses falling due and payable for the planting, care and cultivation of the said lands, for fulfilling the covenants contained on the part of the party of the second part hereto to be performed in such Home Guarantee Contracts, and such other expenses as may from time to time become necessary in connection therewith, the party of the second part to be absolute judge of the propriety and necessity of such expenditure. A schedule of the estimated expenses is hereto annexed and marked 'Schedule D.'

"It is further agreed that for the payments provided for in this second specification the party of the second part may from time to time draw orders upon said party of the first part, payable out of the funds so as aforesaid to be received by them. Provided, however, that the first year of the duration of this trust no moneys shall be withdrawn from the party of the first part for any of the purposes

set forth in this second specification unless there shall remain after the withdrawal of the said moneys, enough cash on hand for the payment of all liabilities which have accrued at the time of the withdrawal, and all fixed charges for a period of six months after the date of the said withdrawal.

“Third: Any surplus of moneys so received remaining in the hands of the party of the first part at the expiration of any year shall be carried over into the next year’s account to be used in paying the expenses and making the payments aforesaid for that year, and in securing the release from the aforesaid mortgage and from the remaining payments due to said McDonnell and wife of any part of the said land which may have been selected by any of the said intending purchasers, and which such purchasers may become entitled to under such Home Guarantee Contracts, prior to the expiration of the five years’ time contemplated by said contracts; otherwise, such funds shall remain in the hands of the said party of the first part until the completion of this trust, but subject to be used for any exigencies which, in the judgment of said trustee, may arise in carrying out this trust according to the true intent and meaning thereof.

“Fourth: To receive the title to such land upon final payment upon any part or parcel of the whole thereof in trust, as to portions completely paid for by the purchasers aforesaid, for the said purchasers, and as to the balance in trust for the party of the second part and for such purchasers under such Home Guarantee Contracts plan according to their respective rights.

“Fifth: Upon the payment in full of all moneys to be paid to said McDonnell and wife and to the said Balfour, Forman and Guthrie, the remaining moneys in the hands of the said trustee shall be paid to the party of the second part or its assigns, either as to the whole or to any part or parts of such funds so remaining.

“It is expressly understood and agreed hereby that the party of the second part hereto may at any time substitute other purchasers in the place and stead of any who may at any time forfeit their rights under such applications

or under such Home Guarantee Contracts, and such substituted purchasers shall be in all respects protected hereby to the same extent as if they had been specifically mentioned in the schedule above referred to hereto attached; and it is expressly provided that such new purchasers may be substituted upon such terms as the party of the second part may make with them, but in no case at a less price than the amounts remaining due from the purchasers so in default and failing to make their payments.

“And the party of the second part hereby covenants that it will from time to time procure purchasers to take the place of any so falling out by reason of the non-payment of the sums of money due from them.

“It is further expressly stipulated and agreed that the party of the first part hereto shall, within the first ten days of each month of the duration of this trust, make written report to the party of the second part, its successors or assigns, of all money received and paid out by them in the carrying out of this agreement.

“It is further agreed between the parties that in the event of any of the purchasers aforesaid exercising the option given them by section 8 of the Home Guarantee Contract set forth in Schedule B aforesaid, that then and in such case the payment made by said purchaser at the time of the exercising of the said option shall be made to the party of the first part and be considered as one of the payments referred to in Schedule A to be disbursed by the party of the first part as set forth in this agreement; and it is further stipulated that the mortgage and promissory note executed at such time by the said purchaser shall run to the party of the first part and be held by the party of the first part pursuant to the terms of this agreement and as one of the assets of the trust, and as the same may be disposed of, either by sale, or by assignment to said McDonnell in payments of amounts then due or to become due upon such contracts. No such sale or assessment shall be made at a discount without the consent of said party of the second part.

“It is further agreed that the party of the first part for

its services performed and to be performed, pursuant to the stipulations of this agreement of trust, shall receive from the party of the second part the sum of two hundred dollars per annum, on the first day of January, 1895, and on the first day of January of each succeeding year during the continuance of the said trust, and the further sum of five per cent on all collections made or received by the party of the first part on contracts assigned to it, and the further sum of all attorneys' fees which the party of the first part shall be obliged to pay for advice and services growing out of any matters arising under or by reason of the execution of this agreement. And it is further agreed between the parties that the party of the first part may retain any of the said moneys due it by reason of the stipulations contained in this paragraph out of any moneys in its hands received under or pursuant to this contract.

"In Witness Whereof," etc.

After the execution of this assignment and agreement the appellant assumed full charge of the interests of the Stearns Fruit Land Company, and thereafter continued to represent such interest as if it had succeeded thereto with the full legal title. Later on the McDonnells suffered certain judgments to be entered against them, which became liens against the land and prevented its free transfer as contemplated in the several agreements. Thereafter a deed was made by the McDonnells to the appellant, and the following agreement entered into:

"This Declaration of Trust and Agreement entered into in triplicate on this 21st day of August, 1896, between Columbus McDonnell and The Title Guarantee and Trust Company, a corporation, of Portland, Oregon.

"Witnesseth: Whereas, on the twelfth day of February, 1894, said McDonnell and Margaret McDonnell, his wife, entered into an agreement with the Stearns Fruit Land Company, which said agreement appears of record in Book 21 on page 270 of the Record of Deeds of Clarke County, Washington, and is hereinafter known as said agreement,

and which sets forth the terms of purchase by said Stearns Fruit Land Company of certain lands in Clarke County, Washington, and

“Whereas, the legal title to the lands mentioned in said agreement has since the date thereof remained in said McDonnell’s name, and whereas there have been several liens placed of record in said Clarke County, upon said property, which hamper the free and easy handling of the title to said lands as is required by said recorded agreement; and

“Whereas, it is for the benefit of said McDonnells, and more convenient in carrying out the purposes of said recorded agreement that said The Title Guarantee and Trust Company should be made trustee to act in lieu of said McDonnells, and whereas for this purpose said Columbus McDonnell and Margaret McDonnell, his wife, have this day deeded the lands mentioned in said recorded agreement to said The Title Guarantee and Trust Company, as trustee; and

“Whereas, said Stearns Fruit Land Company did for its benefit and convenience assign its said contract with said McDonnells to said The Title Guarantee and Trust Company on August 28th, 1894, which assignment appears of record in Book 24, page 235 of said records, under which assignment said The Title Guarantee and Trust Company acts as trustee for said Stearns Fruit Land Company in the matter of collections from sub-purchasers of parts of said lands

“Now, therefore, in consideration of the premises, it is hereby agreed by the parties hereto that said The Title Guarantee and Trust Company shall act as Trustee for said McDonnells in carrying out the purposes of said recorded agreement, and that it will immediately notify by mail all sub-purchasers of parts of said lands of its sole right to collect the installments of purchase price from them.

“And in further consideration of the premises it is hereby agreed by said McDonnells that during the period of three years from date they nor their assigns shall have the

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right to declare said recorded agreement in any way forfeited or proceed to foreclose it. Provided, however, that if the said Title Guarantee and Trust Company shall not use due diligence in collecting the moneys growing due under the contracts for sale of lands made by the Stearns Fruit Land Company and immediately pay the same over as in said original contract required, or shall in any way neglect to carry out this contract or any of the provisions of the original contract, then, in that event, the said McDonnells may proceed immediately to declare the said agreement void, and foreclose the same if they shall deem it necessary.

"In further consideration of the execution of said trust deed to The Title Guarantee and Trust Company and this agreement, said company at the execution hereof, makes a cash payment of \$500 to said McDonnells on account of the purchase price of said lands. And in the execution of this trust it is hereby agreed that said Trustee shall apply the funds payable to said McDonnells under said recorded agreement, and coming into its hands from said Stearns Fruit Land Company or said sub-purchasers of said land, to satisfy all record claims against said land and all orders of said McDonnells, or either of them, heretofore accepted by the said Title Guarantee and Trust Company, and after deducting for itself a commission of five per cent upon all collections made in the matter of this trust out of said receipts, which commission shall be chargeable to the account of the Stearns Fruit Land Company, shall apply the balance of said receipts in payment of the amount due said McDonnells under the original agreement. It is further understood and agreed that the claims of Columbus McDonnell against the Stearns Fruit Land Company for overdue payments up to the date hereof; for care and cultivation of the premises to date, for bonus paid for borrowed money; also all the claim of said McDonnell against said Stearns Fruit Land Company for damages for being removed from the premises before the time specified in said original contract, and for rent, not only up to date but up to the end of the term of this contract, towit: three

years from date, shall be the sum of three thousand dollars; and the above is hereby expressly declared to be a settlement and accounting between the parties hereto of all claims to date, except said claim for damages and rent, which is settled and accounted up to three years from the date hereof. Said three thousand dollars to be paid from time to time as moneys are collected into the trust fund hereby contemplated, out of the moneys that would otherwise be paid to the Stearns Fruit Land Company; and this three thousand dollars is a payment over and above the amount due according to the original contract. And it is further distinctly understood and agreed that the payment of this \$3,000.00 shall not affect in any way the money due and to grow due under the original contract. And it is further expressly understood and agreed that this agreement shall in no wise affect the original contract heretofore mentioned, but the same shall be and is in full force and effect, except as to interest up to date. And in addition to said three thousand dollars, there shall be paid to the said McDonnell the judgment which the said McDonnell has against the said Stearns Fruit Land Company, aggregating about two hundred dollars; also attorneys' fees of said McDonnell in the settlement and adjustment of this matter, aggregating five hundred dollars; the said last mentioned sums are to be paid in the same manner as the three thousand dollars; and

"Whereas, the said Stearns Fruit Land Company has employed said Columbus McDonnell to take charge of said lands and cultivate and care for them and the trees and the improvements thereon for the sum of twelve hundred dollars per year, which sum is to be paid quarterly and is to be decreased proportionately per year as parts of said land are conveyed to the sub-purchasers thereof, said The Title Guarantee and Trust Company hereby guarantees the payment to said McDonnell by said Stearns Fruit Land Company any sums accruing from the date of these presents to him by virtue of said contract of hiring to cultivate and take charge of said land. It is also understood and agreed that the amount of work to be done

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and performed by said McDonnell in the care and cultivation of said lands above specified shall be that amount and measure specified in the Home Guarantee Contract between said Stearns Fruit Land Company and its purchasers.

"It is further in this matter agreed that at any time upon giving The Title Guarantee and Trust Company thirty days' notice the said Columbus McDonnell may cease and discontinue the care and cultivation of said premises, whereupon his salary of twelve hundred dollars per annum above mentioned shall also be discontinued. It is further understood and agreed that the crop now growing on the said land shall be and is the property of the McDonnells and they shall have the right to harvest and take the same off of the said land.

"It is agreed by and between the parties hereto, that the payment by the said Title Guarantee and Trust Company to the said McDonnell of the sum of twenty thousand dollars (\$20,000.00) payable as follows: The sum of Thirty dollars per acre August 21st, 1896; Ten dollars per acre January 1st, 1897; Ten dollars per acre January 1st, 1898; Ten dollars per acre January 1st, 1899; Ten dollars per acre January 1st, 1900; and the balance due on or before April 1st, 1900.

"The said sum of three thousand dollars to be payable on or before the....day of.....189.... and the same sum of \$500.00 as attorneys' fees to be payable on or before the....day of....., 189..., and the other sums of money heretofore set forth, together with interest on all overdue payments at the rate of eight per cent per annum, and the payment of all sums due and to grow due to Balfour, Guthrie and Company as under said original agreement provided, shall be a full and complete payment and settlement of all moneys to be paid to said McDonnell under the said original agreement."

It was found, however, that the appellant could not make deeds to the contract purchasers, because the receipts under the contracts were not sufficient in amount to pay the costs of planting and caring for the orchards and the price

required to be paid to the mortgagees to obtain partial releases from the lien of the mortgage. Moreover, the mortgagees were threatening foreclosure. The parties, therefore, found it necessary to make' some arrangement by which releases could be obtained for a less payment per acre than the contract called for, and also to obtain an extension of time for the payment of the principal due upon the mortgage. To that end they procured one Vincent Cook to purchase the mortgage, and entered into the following agreement with him:

"This Agreement, made and entered into this 8th day of January, 1897, between Columbus McDonnell and Margaret McDonnell, his wife, the parties of the first part, by their trustee and agent, The Title Guarantee and Trust Company, a corporation, the Stearns Fruit Land Company, a corporation, party of the second part, The Title Guarantee and Trust Company, a corporation, the party of the third part, and Vincent Cook, party of the fourth part.

"Witnesseth: Whereas, the parties of the first part were on the 20th day of March, 1893, the owners in fee of the following described real property, to wit: [Describing the lands in question and certain other lands, a part of which are situated in Walla Walla County, in this state, and the remainder in Multnomah County, Oregon.] And on said day mortgaged by a mortgage hereinafter referred to as 'said mortgage' to Robert Balfour, Robert Brodie Forman, and Alexander Guthrie, which mortgage was recorded at page 82 of Book 19 of Records in the office of the Auditor of Clarke County, State of Washington, and at page 266 of Book 41 of Mortgage Records in the office of the Auditor of Walla Walla County, State of Washington, and by a trust deed to W. J. Burns, which said deed was recorded at page 32 of Book 196 of Records of Deeds in the office of the Recorder of Conveyances of Multnomah County, State of Oregon, all of the hereinabove described lands as security for the payment of two

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certain promissory notes, amounting to sixteen thousand dollars (\$16,000), copies of which are set out in said mortgage and upon which there is in fact fourteen thousand eight hundred and eight and forty-hundredths dollars now owing as principal, which said notes are hereinafter referred to as 'said mortgage notes.'

"And whereas, the said parties of the first part did on the 12th day of February, 1894, enter into a written contract with the party of the second part, contracting to sell all of said land in Clarke County to the party of the second part and thereafter on the 28th day of August, 1894, the party of the second part did assign all of its right, title and interest in, to and under said last mentioned contract to the party of the third part, and thereafter on the 21st day of August, 1896, the parties of the first part did by quit claim deed convey all their interest in said land in Clarke County to the party of the the third part, and the legal title to said land in Clarke County is now vested in the party of the third part as trustee for the benefit of the parties of the first and second parts, and whereas the party of the second part has made certain contracts for the sale of portions of said lands in Clarke county, and the party of the third part desires to make deeds conveying title free of encumbrance to such portions and other portions of said lands, but is unable to do so on account of the mortgage above mentioned.

"And whereas, the party of the fourth part is willing to buy said mortgage notes, mortgage and trust deed from the present holders thereof, and to make partial releases of said portions and other portions of said land in Clarke county from the lien of said mortgage upon the considerations hereinafter stated, and the parties of the first and second and third parts each and all desire said partial releases so made and said mortgage and trust deed and mortgage notes to be assigned to the party of the fourth part as aforesaid.

"Now, Therefore, in consideration of the premises and of the considerations hereinafter mentioned, the parties of the first part for themselves, their heirs, executors, administrators and assigns, and the party of the sec-

ond part for itself, its successors and assigns do hereby consent to the making of any partial releases of said land in Clarke county from the lien of said mortgage that may be agreed upon by the parties of third and fourth parts and upon any terms or considerations agreed upon by said parties of the third and fourth parts and without prejudice in any way to the rights of the party of the fourth part to hold all parts of the lands mentioned in said mortgage and trust deed remaining after any or all of said partial releases shall have been made as security for the payment of any sums of money that may remain unpaid upon said mortgage notes and without prejudice to his right to foreclose said mortgage and trust deed upon any default made in the payment of the principal or interest or any other sum or sums provided to be paid by the terms of said mortgage or trust deed or said mortgage notes, or upon any breach of any of the conditions of said mortgage or trust deed to be performed by the parties of the first part.

“And the party of the second part in consideration of the premises and the other considerations mentioned herein agrees to make and deliver to the party of the fourth part at the execution of this agreement its promissory note payable to the party of the fourth part forty-two months after date for the sum of fourteen thousand eight hundred and eight and forty-hundredths dollars (\$14,808.40), bearing interest at the rate of ten per cent per annum, payable quarterly, said note to be held by the party of the fourth part with said mortgage notes, mortgage and trust deed, and all payments hereafter made on the principal of said mortgage notes to be also credited on said note of the party of the second part as of the first interest paying date after said payment to the said party of the fourth part. The party of the second part also agrees to repay to the party of the third part all moneys expended by it for recording mortgages or assignments of mortgages or other instruments of any kind authorized or made pursuant to this agreement, and on account of the difference of interest between said mortgage notes and the note of the said party of the second part, and also all other expense caused to the party of

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the third part by reason of any of the terms of this agreement. And the party of the third part in consideration of the premises and other considerations herein stated agrees that at the time any partial release for any of said portions of said land in Clarke county from the lien of said mortgage is made by the party of the fourth part that it, the said party of the third part, will pay to the party of the fourth part the sum of eighty dollars per acre in United States gold coin for the portions so released as payment on the principal of said mortgage notes and that it, the party of the third part, will not convey any portion of the said land in Clarke county to any one without first obtaining a partial release therefor from the lien of said mortgage from the party of the fourth part as is herein provided for, and that it will not sell or convey any portion of said land in Clarke county for a less final payment than one hundred and twenty dollars per acre, to be paid in cash or part cash, the balance of purchase price to be secured by promissory note bearing interest at eight per cent. per annum and mortgage securing the same, being a first lien on the premises sold or conveyed; that if it sells any portion of said land in Clarke county for which it receives less than eighty dollars per acre in cash, it will pay to the party of the fourth part all cash received on such sale, to be applied as payment upon the principal of said mortgage notes, and that it, the party of the third part, will assign to the party of the fourth part the note and mortgage it may receive on any such sale to be held by the party of the fourth part in lieu of the land so released and for the sale of which said note and mortgage was taken. And the party of the third part also agrees to pay all fees for recording mortgages or assignments of mortgages or other instruments of any kind which may be made or assigned to the party of the fourth part under or pursuant to the terms of this agreement, and that it will pay all taxes on all lands herein described now due or hereafter to become due upon which the lien of said mortgage or trust deed continues, and will pay all expense of making such partial releases, and the party of the third part further

agrees that it will pay the interest on said promissory note of the party of the second part to the party of the fourth part promptly as the same falls due, all out of any money received by it on account of any contracts made for the sale of any portion of said lands in Clarke county other than the moneys herein agreed to be applied as payments on the principal of said mortgage notes. And the party of the fourth part, in consideration of the premises and the other considerations herein expressed agrees to buy said mortgage notes and mortgages and trust deed securing the same, provided that said securities can be bought for the principal sum now due thereon not exceeding fourteen thousand eight hundred and eight and forty-hundredths dollars (\$14,808.40), and that thereafter he will execute and deliver such partial releases of portions of said land in Clarke county as the party of the third part may request of him upon the said party of the third part paying to him therefor the sum of eighty dollars per acre for each acre and fraction thereof in the tract so released. The said tracts to be released by number as shown upon the plat recorded in the office of the county auditor in said Clarke county, Washington, known as the plat of 'Roselawn.' That he will apply said payment of eighty dollars per acre upon the principal of said mortgage notes as of the first day of the next interest-paying term after its receipt from the party of the third part; that he will also execute such partial releases when the party of the third part conveys any such portions of land in Clarke county without receiving the full sum of eighty dollars per acre in cash upon the payment of such sum as may be received by the party of the third part upon such sale to him, the party of the fourth part, to be applied as payment upon the principal of said mortgage notes as of the first day of the next interest-paying term after its receipt from the party of the third part, provided the party of the third part, at the time of such payment be less than eighty dollars per acre, assign to the party of the fourth part the note and mortgage received upon such sale to secure the payment of balance of the purchase price of one hundred and twenty

dollars (\$120.00) per acre to be held by him as security in lieu of the portion of said land in Clarke county so released; he agreeing, however, that upon the payment to him by the party of the third part of enough more money to make up the full payment of eighty dollars per acre on any of said tracts so sold for a less cash payment than eighty dollars per acre to reassign without recourse to him said note or notes and mortgage or mortgages securing the same to the party of the third part, or to such person as it may direct, and will credit such partial payment on said mortgage note as above provided where the whole payment of eighty dollars per acre is made as of the first interest-paying date after its receipt from the party of the third part. He further agrees to credit so much of the interest paid upon said promissory note made by the party of the second part upon the interest accruing upon said mortgage notes as will keep the interest on said mortgage notes fully paid up to the time of payment of interest on said promissory note if the same be sufficient therefor, and that he will not foreclose said mortgage and trust deed or either of them before the maturity of said promissory note of the party of the second part, if interest on said mortgage notes and on said promissory notes of the party of the second part, be at all times when due, promptly paid. And the party of the fourth part consents to the use by the party of the third part of any funds in its hands on account of its trust concerning said lands in Clarke county at the beginning of each quarter after it shall have paid the accrued interest due on said promissory note of the party of the second part, for any of the purposes of its said trust as expressed in the contracts now existing between the party of the third part and the party of the first part, and the party of the third part and the party of the second part.

"In Testimony Whereof," etc.

Later on the following supplemental agreement, being the last of the written agreements, was entered into between the same parties:

"The Supplemental Agreement made and entered into

this 10th day of December, 1899, by and between Columbus McDonnell and Margaret McDonnell, his wife, parties of the first part, and Stearns Fruit Land Company, a corporation, party of the second part, The Title Guarantee and Trust Company, a corporation, party of the third part, and Vincent Cook, party of the fourth part.

“Witnesseth: Whereas, heretofore on the 8th day of January, 1897, all of the above named parties entered into an agreement pursuant to which said party of the fourth part purchased from Robert Balfour, Robert Brodie Forman and Alexander Guthrie that certain mortgage and the notes secured thereby, made and executed and delivered by the parties of the first part to said Balfour, Forman and Guthrie on the 20th day of March, 1893, which was recorded at page 82 of Book 19 of Records, in the office of the Auditor of Clarke county, state of Washington, and at page 266 of Book 41 of Mortgage Records in the office of the Auditor of Walla Walla county, in said state; and whereas, said agreement of January 8th, 1897, provided for making partial releases from the lien of said mortgage of portions of the land mortgaged in Clarke county, but did not provide for such releases as to the land in Walla Walla county; and whereas, the parties of the first part have sold all of said land in Walla Walla county and desire to have the same released from the lien of said mortgage; and whereas, on condition of the said parties of the first part making to the party of the fourth part an assignment of the mortgage and notes for nine hundred and fifty dollars received by them on sale of said land in Walla Walla county as security to be held by the party of the fourth part in lieu of said land in Walla Walla county, the parties of the second and third parts are willing to consent to said release of said land without prejudice to any of the conditions of said agreement of January 8, 1897, and the party of the fourth part is now willing to make said release of said land from said first mentioned mortgage.

“Now, Therefore, in consideration of the premises and said release of said land in Walla Walla county by the party of the fourth part, the parties of the first and second

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and third parts hereby consent to said release of said Walla Walla county lands without prejudice to any of the terms or conditions of said agreement of January 8, 1897, and hereby ratify and confirm said agreement and all acts done pursuant thereto. And in consideration thereof and of the assignment of the said \$950.00 mortgage and notes to him by the parties of the first part, the party of the fourth part hereby agrees to release said land in Walla Walla county from the lien of said mortgage first mentioned and to credit any money received on account of said \$950 mortgage and notes at the time and in the manner provided for crediting money on principal of notes of Columbus McDonnell and wife and Stearns Fruit Land Company in said agreement of January 8, 1897; and the party of the second part hereby consents that the party of the third part may and shall out of the first money coming into its hands from the 'Roselawn Trust' available for such purposes reimburse and repay the parties of the first part any sum of money so received and credited by the party of the fourth part on note of party of second part. And on full payment of the first mentioned mortgage, the party of the fourth part agrees to reassign to the parties of the first part said \$950 mortgage and notes or so much of the same as may then remain unpaid and unsatisfied.

"In Testimony Whereof," etc.

During the period which intervened between the time of the making of the first contract and the commencement of this action many of the contracts of sale made by The Stearns Fruit Land Company, as well as others made by the appellant as its successor in interest, were forfeited by the purchasers, so that the net result was that appellant actually deeded of the land only 147.975 acres, leaving remaining thereof undisposed of 243.505 acres, something over one hundred acres of which had been planted to prune trees. Of the land deeded, however, all was not paid for in cash. Where such was the fact, a mortgage

on the land was taken to secure the deferred payments. These mortgages, at the time of the commencement of this action, consisted of first mortgages of the face value of \$8,481.29, in the hands of Vincent Cook, and second mortgages of the face value of \$2,911.25, in the hands of the appellant.

This action was begun in February, 1900. In its amended complaint the appellant set out the several contracts before referred to, and contended that the effect of the same was to make it a trustee of both the Stearns Fruit Land Company and the McDonnells, responsible only for a faithful performance of the trust evidenced by the several writings; that it had performed the same so far as it was able; that in doing so it had expended over and above its receipts the sum of \$2,200.29; that it was entitled to the sum of \$3,145.26 for its services; and that \$809.98 was due it as interest. It prayed an accounting, for judgment for the amount found to be due it, that the amount found to be due be declared a lien on the second mortgages in its hands, and the land remaining unsold, and that the lien be foreclosed, the mortgages sold, and the proceeds applied in satisfaction of the amount due, and that the lands be sold for any deficiency which should remain thereafter. For answer the respondents admitted the execution of the several written agreements mentioned, but denied that the appellant was a mere trustee thereunder, and denied, also, that the appellant had correctly stated the account. They alleged affirmatively that the effect of the several agreements was to make the appellant a purchaser of the land mentioned; that the appellant was by reason thereof, and by reason of other matters alleged in the answer, indebted to the respondents in the sum of \$36,870.54, with interest aggregating another large sum.

They also prayed that the amount found due them be declared a lien on the land remaining unsold by the appellant, and that the same be sold and the proceeds of the sale applied in satisfaction of the amount found due. The new matter in the answer was put in issue by a reply. A trial was had on the issues thus made, resulting in a judgment in favor of the respondents for a total sum, found to be due on September 13, 1901, of \$29,477.79. The judgment further directed that the appellant satisfy the mortgage held by Vincent Cook, which then amounted to the sum of \$6,479.06, also two certain judgments, known as the Slocum and Wintler judgments, held by Robert Hall, and that it cause to be delivered to the respondents the note and mortgage mentioned in the supplemental agreement with Vincent Cook, or, in case they should fail so to do, that judgment be entered for the respective amounts of the several obligations.

From the judgment entered it will be observed that the trial court adopted the respondents' view of the several contracts. It held that the contract between the Stearns Fruit Land Company and the respondents was a contract to convey, optional, perhaps, before the company entered upon the performance of it, but absolute after that time, binding it to make the several payments therein specified as the purchase price of the land, notwithstanding the contract seemingly expressly provided otherwise; construing the provision of the contract to the effect that the owners would make deeds to parcels on the payment of a particular price per acre to be a provision to enable the company to make sales in advance of the final payment. But, however plausible the reasoning may be by which this conclusion is reached, it seems to us that it is not the correct interpretation of the contract, when considered by itself, or in the light of the acts of the parties

under it. Looking to the wording of the contract, we find that it contains a promise on the part of the McDonnells to convey to the other party to the contract the lands therein described on the payment of the taxes due and to become due, a certain mortgage then a lien on the premises, and a sum which, taken together with the taxes due and back interest on the mortgage, will make \$20,000, in installments of certain amounts at fixed times. Then comes a promise on the part of the other party to pay the taxes then due on or before a certain date, with an express provision that it does not agree to make any of the other payments. This is followed by a forfeiture clause to the effect that, if any one payment is not made when due, all previous payments shall be forfeited at the option of the first parties. Following this is an agreement that the McDonnells will convey any part of the land lying south of a certain road on payment to them or on the mortgage a fixed price per acre according to location. It is worthy of notice here that these latter prices were greatly in excess of the prices fixed per acre in that part of the contract providing for the sale of the entire tract; the rate for the entire tract being about \$90 per acre, while the other fixed the minimum price at \$125 per acre, and ranged as high as \$300 per acre. It was also expressly provided that a forfeiture of the contract for non-payment of the amounts as they became due should not in anywise "affect the parties as to any of said land already sold and conveyed." Taking the contract, alone, therefore, and reading it altogether, it hardly seems that it was the intention of the parties that there should be an absolute sale, or that the Stearns Fruit Land Company, or the appellant as its successor in interest, should be obligated to pay for the land at all events whether it sold the same or not. If the court may reason from its knowledge of the general stability of land values,

it knows, from the testimony as to the present values of the land remaining unsold and unimproved, that the prices agreed upon were grossly in excess of the actual cash value of the land. True, the payments extended over a long period of time; but even this would not equalize the contract values with the actual values of the land. The purposes of the parties were therefore speculative. The McDonnells were willing, for the chance of obtaining this speculative value for the land, to permit the Stearns Fruit Land Company and its successor to divide it into small tracts, plant it to prunes, and dispose of it to third persons at prices to be fixed by the company or its successor, so long as they received the prices agreed upon in the contract. If all of it should be taken, the price should be something less than \$90 per acre; if any part less than all, the price should be \$125, \$200, or \$300 per acre according to its location; but it was not understood that the Stearns Fruit Land Company was to take more than it was able to sell to third parties, unless it decided to do so before a forfeiture should be declared, and should make the necessary payments to complete the amount of the purchase price. The acts of the parties under the agreement and the subsequent agreements all point to the same conclusion. The McDonnells not only acquiesced in all of the various shifts and arrangements made by the appellant with other interested parties, but they seem never to have demanded a payment according to the terms of the contract as they now seek to construe it. Other circumstances could be cited from the evidence which tend to support the belief that they never thought they had made an absolute sale; but, without stopping to point them out, we conclude that the Stearns Fruit Land Company did not obligate itself by the original contract to purchase the land described therein, nor did the

appellant as its successor in interest, assume such an obligation.

We cannot, however, accept the appellant's theory that it is a mere trustee, entitled to compensation from the McDonnells for its services. As between itself and the McDonnells, it was substituted in the place and stead of the Stearns Fruit Land Company, and has such rights and privileges and is subject to the same obligations as that company would have had or would have been subject, had no assignment been made. In other words, so far as the McDonnells are concerned, the Stearns Fruit Land Company and the appellant are one and the same person. It is true there was language used in the contract of August 21, 1896, from which it might be inferred that the parties intended to make the appellant trustee for both of the original parties with a limited liability; but the subsequent acts of the parties, as well as the agreement of January 28, 1897, show the true intent of the parties was to make their relations as we have defined them to be. It remains, then, to inquire what the rights and liabilities of the parties are which grew out of these relations. Taking up the question of the appellant's liabilities first, it is at once apparent that it became liable for the land sold to third persons under the guaranty contracts. These aggregated, as we have said, 147,895 acres, a part of which bore the minimum price of \$125 per acre, and a part \$200 per acre, the total being, according to the findings of the trial court, \$19,546.88. In addition to this, it was obligated to pay the sum fixed in the contract of August 21, 1896, as liquidated damages, together with the judgment and attorney's fee herein named; the whole amounting to the sum of \$3,700. It also obligated itself by the contract of August 21, 1896, to pay Columbus McDonnell for his services in tending the orchard. There is a dispute in the evidence

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whether or not all sums earned under this last head were paid; but as the trial court seems to have found that they were so paid, we will follow its conclusion. The aggregate of the principal sum of the appellant's liabilities is therefore:

| | |
|------------------------------|-------------|
| Land sold..... | \$19,546.88 |
| Liquidated damages, etc..... | 3,700.00 |
| Total..... | \$23,246.88 |

As against this it is entitled to credit for the sums paid on account of the purchase price of the land to the mortgage holders and to the McDonnells personally. Also for the amount paid for taxes accrued prior to April 1, 1894, as per the stipulation in the original contract, and the amounts paid as the purchase price of the Slocum and Wintler judgments which gave rise to the trust deed. These several items are as follows:

| | |
|-----------------------------------|-------------|
| Amount paid mortgagees..... | \$15,194.63 |
| Amount paid McDonnells..... | 2,606.95 |
| Taxes due prior to 1894..... | 483.04 |
| Slocum and Wintler judgments..... | 515.75 |
| Total..... | \$18,800.37 |

Deducting this sum from the sum which the appellant is obligated to pay leaves a balance owing from the appellant to the McDonnells of \$5,446.51. As this sum has been long overdue, it is right that the appellant pay interest upon it for a reasonable time. From the somewhat meager data in the record on this point it is difficult to find a starting point from which to make the calculation, but we think it no more than just to make the interest equal to the difference between the principal sum found to be owing as above stated and the balance due at the time of the trial on the mortgage to Balfour, Guthrie & Company, now in

the hands of Vincent Cook. The satisfaction of that mortgage will therefore balance the account between the parties and entitle the appellant to all moneys and second mortgages in its hands, and all of the first mortgages due from the contract purchasers held by Vincent Cook as collateral to the principal mortgage. The judgment, however, must provide for certain other matters. Vincent Cook holds, in addition to the mortgages on the lands sold, a mortgage belonging to the McDonnells covering the Walla Walla land, which was the subject-matter of the supplemental contract with Vincent Cook, the face value of which is \$950. The McDonnells are entitled to a return of this mortgage, or, if it has been collected, to its value in money. The Slocum and Wintler judgments, while actually belonging to the appellant, stand in the name of Robert Hall. An execution was issued for the unpaid balance on these judgments, under which the lands remaining unsold standing in the appellant's name were sold to Hall. The McDonnells are entitled to a satisfaction of these judgments and such an acquittance from Hall as will clear the record title. The McDonnells are also entitled, of course, to a reconveyance from the appellant of all the lands not sold to the contract purchasers. As Columbus McDonnell has died since the trial of the cause in the court below, and Margaret McDonnell has been confirmed as executrix of his estate, the judgment ordered will be entered with reference to this changed condition.

It is ordered, therefore, that the judgment appealed from be reversed, and the cause remanded with instructions to enter a judgment to the following effect:

1. That the appellant be required to pay to Vincent Cook the amount remaining due on the Balfour, Guthrie & Company mortgage, cause the same to be satisfied of record, and turn back to the respondents the note and mort-

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gage on the Walla Walla land, or pay the amount thereof to them if the same has been collected by Vincent Cook.

2. That the appellant cause satisfaction to be entered of record of the Slocum and Wintler judgments, and cause Robert Hall to make such a conveyance of his purported title to the respondents as will clear the record of any interest he may seem to have in the land sold under those judgments.

3. That the appellant convey to the respondents all of the land conveyed to it in 1896, not heretofore conveyed by it to the contract purchasers.

4. That on compliance with the foregoing conditions the appellant be awarded all of the mortgages now in its hands or in the hands of Vincent Cook as its own property, save the mortgage on the Walla Walla land above mentioned.

5. That the appellant be given sixty days after the remittitur from this court reaches the lower court to comply with the foregoing requirements, and, if at the end of that period it fails or refuses to comply therewith, that judgment be entered against it for the value of the land deeded to it and remaining unsold by it at the rates named in the contract between the Stearns Fruit Land Company and the McDonnells, for the amount remaining due on the mortgage in the hands of Vincent Cook, for the amount of the face value of the note and mortgage on the Walla Walla land, and that the same be declared a lien upon all of the unsold lands, and the mortgages remaining in the hands of Vincent Cook pledged to secure the Balfour, Guthrie & Company note and mortgage, first and superior to any claim thereon of the appellant. The appellant will recover its costs on this appeal.

MOUNT, HADLEY, ANDERS and DUNBAR, JJ., concur.

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| 32 | 450 |
| 34 | 584 |
| 435 | 149 |
| 82 | 450 |
| 86 | 264 |

[No. 4639. Decided August 4, 1903.]

J. A. TAYLOR, *Respondent*, v. SPOKANE FALLS & NORTH-
ERN RAILWAY COMPANY, *Appellant*.

APPEAL — JURISDICTION OF SUPREME COURT — AMOUNT IN CONTRO-
VERSY.

The appellate jurisdiction of the supreme court would extend to a case in which the original complaint claimed damages in excess of \$200 for the killing of cows, even though the claim as made in an amended complaint had reduced the damages sued for to the sum of \$200. (Anders and Dunbar, JJ., dissent.)

DAMAGES — MARKET VALUE OF CATTLE KILLED — EVIDENCE.

Evidence of the quantity and value of milk given by certain cows, which were chiefly valuable for their milk, is admissible for the purpose of aiding the jury in determining their market value in an action for damages for their death.

RAILROADS — KILLING CATTLE — FAILURE TO FENCE — NATURAL BAR-
RIERS.

The existence of natural barriers along a railway track would not excuse the company from liability for stock killed at that point, where there was free access to the track at the ends of such barriers, under Bal. Code, § 4332, which provides that "it shall be *prima facie* evidence of negligence on the part of defendant to show that the railroad track was not fenced so as to turn stock from the track."

Appeal from Superior Court, Stevens County.—Hon. WILLIAM E. RICHARDSON, Judge. Affirmed.

W. H. Thompson, S. Douglas and M. J. Gordon, for ap-
pellant.

W. H. Jackson and C. A. Mantz, for respondent:

The plaintiff is entitled to recover the market value of the stock, and to this end evidence is admissible to show all their qualities which affect their market value. *St. Louis, etc., Ry. Co. v. Dudgeon*, 28 Kan. 283; *Central Branch Union Pacific Ry. Co. v. Nichols*, 24 Kan. 242;

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Young v. Kansas City, etc., Ry. Co., 52 Mo. App. 530. Testimony as to what plaintiff had been offered for one of his cows a short time before the killing was proper as tending to show market value. *Galveston, etc., Ry. Co. v. Davis*, 1 White & W. Civ. Cas. 147.

The opinion of the court was delivered by

MOUNT, J.—This is an action to recover damages for the loss of two cows belonging to respondent, and killed by appellant's train of cars upon its railway track. The original complaint alleged damages in the sum of \$200 for the value of the cows, \$25 special damages, and damages at the rate of \$2 per day from the date the cows were killed. Upon motion of appellant, the allegations of special damages were, by order of the court, stricken out of the complaint, and an amended complaint filed wherein respondent alleged his damages at \$200, the value of the cows. The answer, after denying the material allegations of the complaint, pleaded that plaintiff carelessly and negligently permitted the cows to run at large and willfully abandoned them at and near the right of way of the railway company; that the loss of the animals was caused by the negligence of the respondent. The reply denied these allegations of the answer. On these issues the cause was tried before the court with a jury, which returned a verdict in favor of the respondent for \$150. Judgment was entered on the verdict, and from this judgment defendant appeals.

Respondent moved to dismiss the appeal upon the ground that the amount in controversy does not exceed the sum of \$200. The constitution provides (art. 4, § 4) that the appellate jurisdiction of the supreme court "shall not extend to civil actions at law for the recovery of money or personal property when the original amount in controversy or the value of the property does not exceed the sum of

\$200.” The question upon this motion is, does the amount alleged and prayed for in the original complaint control, or does the amount alleged and prayed for in the amended complaint determine the original amount in controversy. The amount alleged and prayed for in the original complaint was in excess of \$200. But the excess was stricken out on motion of appellant by an order of the court entered on the journal. It is true no formal exception to this order was taken by respondent, but none was necessary. The Code provides: “It shall not be necessary or proper to take or enter an exception to any ruling or decision mentioned in the last section which is embodied in a written judgment, order or journal entry in the cause.” Bal. Code, § 5051. If judgment had gone against the plaintiff after the amended complaint had been filed and trial had, and plaintiff had appealed, this court would certainly have entertained jurisdiction of such appeal, because the original amount in controversy was more than \$200. On such appeal this court would have reviewed the ruling of the lower court in striking out the items in excess of \$200. Since the plaintiff could have appealed because the original amount in controversy was in excess of \$200, it follows for the same reason that the defendant may now appeal, and that this court has jurisdiction. The motion is therefore denied.

Errors 1 and 2 are based upon rulings of the lower court permitting plaintiff to testify as to the quantity and value of milk given by the cows. This class of evidence was offered as tending to show the value of the cows. We think it was competent for that purpose. The value of the cows was an issue in the case. The cows were chiefly valuable for milk, and the quantity and value thereof was a factor which the jury had a right to consider with other evidence in arriving at their market value.

The third and fourth errors assigned are based upon the refusal of the court to allow defendant to show that there were natural barriers at or near the point where the cattle were killed, unless it was also shown that the track was also fenced at other places near said point and connected with such natural barriers, and an instruction to the jury based thereon as follows:

"If you find that the railroad track at the point where the cattle were killed was not fenced so as to turn stock from the track, this is *prima facie* evidence of negligence on the part of the company."

The statute, at § 4332, Bal. Code, provides that, "it shall be *prima facie* evidence of negligence on the part of the defendant to show that the railroad track was not fenced so as to turn said stock from the track." The instruction was clearly within the terms of the statute. It was not contended in the case that the natural barrier was anything more than a steep hill or bank along one side of the track for a distance of about sixty feet, and a fill on the other side. There was nothing to prevent stock from going upon the track at this point. It is no doubt true that natural barriers are equivalent to a legal fence where they answer the purpose of a fence and are used as such in connection with a fence; but where there is no attempt to fence the track, and the barriers, though competent for the purpose, are not used as a fence, and there is free access at each end of such barriers, they cannot be held to constitute a fence. If the track had been fenced for a distance of sixty feet on each side thereof and the ends not closed thereby allowing free ingress and egress upon the track to stock, it could not be held to be a fence "*so as to turn stock from the track.*" For this reason the rulings of the court, both in excluding the evidence and in giving the instructions, were correct. There was no evidence whatever in

the record tending to show that the defendant willfully or negligently turned his cattle upon the track, or that they were accustomed to stray thereupon, and for that reason the court properly refused to instruct the jury in reference thereto.

There is no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, J., concur.

ANDERS, J.—While I fully concede that the conclusion announced in the foregoing opinion upon the merits of this case is correct, I am of the opinion that the motion to dismiss the appeal should have been granted, upon the ground that this court has no jurisdiction of the cause. When the amended complaint was filed, the first complaint became *functus officio*, and of no more force than if it had never been filed at all. And since the plaintiff, in the amended complaint on which the trial was had, alleged in effect that he had been damaged in the sum of \$200, and demanded judgment for that amount only, it appears clear to my mind that the amount in controversy, not being in *excess* of \$200, was not sufficient to confer jurisdiction upon this court. I think the amount actually sought to be recovered at the time of the trial must be held to be the “original amount in controversy” within the meaning of the constitution.

DUNBAR, J., concurs with ANDERS, J.

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Argument of Counsel.

[No. 4871. Decided August 6, 1903.]

PHILADELPHIA MORTGAGE AND TRUST COMPANY, *Appellant*, v. V. E. PALMER *et al.*, *Respondents*.

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| 32 | 455 |
| 36 | 287 |
| 32 | 455 |
| 138 | 19 |
| 32 | 455 |
| 30 | 76 |

APPEAL — NOTICE — SUFFICIENCY — DESIGNATION OF RESPONDENTS.

The taking of an appeal not being the commencement of a new action, but a subsequent proceeding in the original action, a notice of appeal, directed to one of the respondents by name and referring to the others under the designation *et al.*, and served upon the attorneys for such parties, is sufficient to give the supreme court jurisdiction.

ADVERSE POSSESSION — TITLE ACQUIRED BY PAYMENT OF TAXES — OCCUPIED AND UNOCCUPIED LAND.

Under Bal. Code, § 5503, vesting title in one who shall continue in actual, open and notorious possession of lands under color of title for a period of seven years, during which time he has paid the taxes thereon, and under *Id.*, § 5504, declaring title in one who, having color of title to vacant and unoccupied land, pays the taxes thereon for seven years, the payment of taxes on land for seven years by one having color of title would vest him with the legal title, although part of such seven years he had been in actual possession, and the balance of the period had allowed the land to lie vacant and unoccupied.

SAME — COLOR OF TITLE — SHERIFF'S CERTIFICATE.

Color of title, within the purview of Bal. Code, §§ 5503, 5504, takes its inception from the date of the sheriff's sale of realty, even though it may be invalid, and not from the date of the execution of his deed pursuant to such sale.

Appeal from Superior Court, King County.—Hon. GEORGE MEADE EMORY, Judge. Reversed.

Smith & Cole, for appellant.

Robert H. Lindsay and *V. E. Palmer*, for respondents:

A certificate of sale is not claim and color of title. No instrument is sufficient under this statute unless it actually purports to convey the title to a party therein named as

grantee. This a certificate of sale does not purport to do. It merely indicates that the party has a conditional right to have the title conveyed at a later date. That conditional right may be defeated before the day upon failure of the condition. *Coleman v. Billings*, 89 Ill. 185; *Bride v. Watt*, 23 Ill. 507; *Converse v. Calumet River Ry. Co.*, 195 Ill. 204 (62 N. E. 887).

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action of ejectment brought under § 5500 of the Code (Ballinger's), in which the appellant, who was plaintiff below, seeks to recover the possession of and quiet its title to certain real property situated in the city of Seattle. The respondents, for answer, set up title in themselves, and prayed judgment that their title be declared superior to that of the appellant. Judgment went for the respondents, and this appeal is taken therefrom.

The respondents moved to dismiss the appeal. This motion was made subsequent to the time the cause was assigned for hearing on the calendar, and after the respondents had appeared and argued the case upon its merits, orally and by brief, without suggesting the defect now thought to be fatal to the appeal, although the same appeared then upon the face of the record, and prior thereto had been drawn to the attention of counsel. Under these circumstances the court would not notice any defect or irregularity in the proceedings, even though so gross as to warrant a dismissal under ordinary conditions; but, as counsel insist that the defect here is one going to the jurisdiction of the court, we will notice it for a moment. The contention of want of jurisdiction is based upon the further contention that all of the parties defendant in the action are not made parties to the appeal. The parties defendant

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are Victor E. Palmer and Carrie D. Palmer, his wife, and J. B. Combs and Persis M. Combs, his wife. The notice of appeal as it appears in the record is as follows:

"In the Superior Court of King County, State of Washington.

Philadelphia Mortgage & Trust Company, a Corporation,
Plaintiff,

vs.

Victor E. Palmer et al., Defendants.

No. 36,426. Notice of Appeal.

To the defendants and to their attorneys, R. H. Lindsay and Victor E. Palmer:

Take notice that the plaintiff herein appeals to the supreme court of the state of Washington, from that certain judgment rendered in this cause on the 10th day of March, 1903, and from the findings of fact and conclusions of law rendered herein, and from the refusal of the court to make the findings of fact and conclusions of law hereinbefore proposed by plaintiff; which appeal is from each and every part of said judgment.

Philadelphia Mortgage & Trust Company, a Corporation.

By Smith & Cole, Its Attorneys.

Due service of the foregoing notice of appeal and the receipt of a copy thereof is hereby admitted this 11th day of March, 1903.

V. E. Palmer & R. H. Lindsay,

Filed Mar. 12, 1903. Attorneys for Defendants.

C. A. Koepfli, Clerk."

It is argued that a notice of appeal is in the nature of an original process by which the parties against whom the appeal is taken are brought before the appellate court; that it cannot be waived; that it must be directed to all the defendants by name whom it is necessary to make respondents, and that no abbreviated reference, direct or indirect, is sufficient to bring such parties into the court; and hence this notice of appeal is fatally defective because it refers to the defendants, other than Victor E. Palmer, if reference is made to them at all, by the "indefinite designation,

'et al.')

A writ of error at common law, being a command from a superior to an inferior court of record commanding the inferior court, in some cases itself to examine the record, in others, to send it to the superior court to be examined, that some alleged error might be corrected, was the commencement of a new action, and hence the application for the writ and the writ itself had to point out clearly not only the cause in which the error lay which was sought to be corrected, but the parties thereto, that they might be summoned to appear in the reviewing court. But the statutory writ of error or appeal which is sued out as a matter of right in the court rendering the judgment on which the error is predicated is in no sense the commencement of a new proceeding or action, but is a mere continuation of the pending proceeding or action, being its transfer from a lower to a higher court for further proceedings. This view of the statutory writ of error in force in the late Territory of Washington, which was but a form of appeal, was taken by the territorial supreme court. In *Montgomery v. Manning*, 1 Wash. T. 434, the defendant in error moved to dismiss because the Christian names of the parties had not been set out in the praecipe and the notice and return of service thereon. The court held, however, that under the Code the taking of a writ of error is not the beginning of a new suit, but a subsequent proceeding in the original action, and that a description of the parties conforming to that given in the court below is sufficient. To the same effect is *Garrison v. Cheeney*, 1 Wash. T. 489. In *Smalley v. Laugenour*, 30 Wash. 307 (70 Pac. 786), this court said that to appeal is not to institute an original proceeding; and to the same effect are the following cases from other jurisdictions: *Macklin v. Allenberg*, 100 Mo. 337 (13 S. W. 350); *Connor v. Connor*, 4 Colo. 74; *Webster v. Gaff*, 6 Colo. 475; *Miller v. Shall*, 67 Barb. 446; *Shuler v. Max-*

well, 38 Hun, 240. See, also, 2 Cyc. 510, 518. If to appeal is not to institute a new proceeding, a notice of appeal cannot be an original process by which parties are brought into court, but is a notice merely by which the parties who are already in court are notified of subsequent and further proceedings in the cause therein pending. True, the statute prescribes how such notice may be given, and is so far mandatory that the prescribed method must be followed in order to effect the appeal; that is to say, to effect the appeal the notice must be given orally at the time the judgment or order appealed from is rendered, or given by serving a written notice on the prevailing party within a certain time thereafter; but this is as far as the statutory mandate goes. It does not prescribe the form of the written notice, nor does it make it imperative that the prevailing parties be described in any particular manner. Why, then, is not the notice in question sufficient? Notwithstanding it omits to name certain of the defendants, it designates with certainty the judgment appealed from, not only by the title it does use, but by giving the number the cause bore in the trial court. It is directed to the defendants and their attorneys, mentioning the attorneys by name. It bears the acknowledgment of these attorneys, who have subscribed themselves as attorneys for the defendants, showing that they understood that all of the defendants in the action were meant to be referred to and to be served by the service on them of the appeal notice. No one, therefore, has been misled by the omission to insert the names of certain defendants in the notice. It is clear that it was intended to make all of them parties to the appeal, and they have all been served with notice in the same way they would have been served had they been named specifically. As these defendants are the only persons affected by the appeal who are entitled to notice, it can be but a mere sacrifice of sub-

stance to form to say that the omissions complained of rendered the notice and service nugatory. We think the notice sufficient, and that the motion to dismiss should be denied.

The appellant in its complaint set up two sources of title: First, a mortgage from the common grantors of itself and the defendants, one Frank N. Wilcox and wife, a subsequent foreclosure of the mortgage, a sale of the property thereunder, and its purchase of the property at the sale; and, second, possession of the premises under claim and color of title made in good faith for seven successive years, during which time it paid all taxes legally assessed on the lands. The respondents for answer denied the validity of the mortgage foreclosure proceedings, and denied the possession as alleged. For an affirmative defense they set up title in themselves by virtue of certain deeds subsequent in time to the appellant's mortgage, but which conveyed to them the legal title subject to that mortgage. For reply the appellant set out facts tending to show an estoppel on the part of the respondents to deny the validity of the appellant's title. The trial court found against the appellant on all of the issues, and error is predicated on each of the findings, but we have found it necessary to discuss those relative only to the second source of title set out in the complaint.

From the record it appears that the premises were sold by the sheriff under the order of sale based on the decree of foreclosure on May 10, 1895. A certificate of sale was issued to the appellant at that time, and a deed to the premises executed one year later. The appellant entered into possession immediately after the sale, and continued in the actual possession of the property by its tenant until May 26, 1896, at which time the house on the premises burned, leaving the land vacant, and from that time until July 10, 1902, when the respondents entered, no actual possession

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was had of the premises by any one, further than that the appellant's agents visited it occasionally for the purpose of showing it to prospective purchasers, and during the years 1900, 1901 and 1902, for the principal part of the time, maintained signs on the premises announcing that the same were for sale. During all of this time the appellant paid the taxes assessed on the land—the street grade assessments as well as the municipal. The Code (§§ 5503, 5504, Ballinger's) provides:

“Every person in actual, open and notorious possession of lands or tenements under claim and color of title, made in good faith, and who shall for seven successive years continue in possession and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title. All persons holding under such possession, by purchase, devise or descent, before said seven years shall have expired, and who shall continue such possession and continue to pay the taxes as aforesaid, so as to complete the possession and payment of taxes for the term aforesaid, shall be entitled to the benefit of this section.

“Every person having color of title made in good faith to vacant and unoccupied land, who shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land to the extent and according to the purport of his or her paper title. All persons holding under such taxpayer, by purchase, devise or descent, before said seven years shall have expired, and who shall continue to pay the taxes as aforesaid, so as to complete the payment of said taxes for the term aforesaid, shall be entitled to the benefit of this section: Provided, however, If any person having a better paper title to said vacant and unoccupied land shall, during the said term of seven years, pay the taxes as assessed on said land for any one or more years of said term of seven years, then and

in that case such taxpayer, his heirs or assigns, shall not be entitled to the benefit of this section."

Conceding that the appellant had claim and color of title made in good faith, it is plain that, had its actual possession continued during the period which intervened between the sale and the entry of the respondents, it would have had title by virtue of the first section of the statute above quoted. It is equally plain that had it never entered into possession of the land, but had left it vacant and unoccupied during the same period, it would have had title by virtue of the second section. But it is said that, because it did not occupy it for the entire time nor leave it vacant for the entire time, it can claim under neither section, and hence the statute will not aid the appellant's title. It seems to us, however, that this is a too narrow construction of the statute. Clearly the intent of the legislature was to confer the legal title to land upon a person who had claim and color of title thereto made in good faith, and who paid the taxes assessed thereon for seven consecutive years, whether such person was in or out of possession; provided, of course, that the land remained vacant while such person was out of possession, and no one else having a better paper title paid taxes thereon. If this be not so, any interruption of a possession no matter for what cause and for however short a time, would stop the running of the statute. So, likewise, would an entrance on vacant land, if made for the purpose of exercising dominion over it, stop the running of the statute. A party in possession could not quit it for a single instant, and one out of possession could not enter for a single instant, without losing all benefit of the statute. This is not the meaning of the statute. It is enough if the period during which he is in possession, added to the period during which he is out of possession, equals seven years.

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It is said, however, that plaintiff's color of title arose, not from the sheriff's sale and the certificate of sale thereunder, but from the execution of the sheriff's deed pursuant to the sale, which was less than seven years prior to the respondent's entry. This court, in construing the statute in force at the time the sale in question was made, has uniformly held that it vested in the purchaser the right to the possession of the land sold against the claim of the owner and every other person except one holding under an unexpired lease from the time of the sale until redemption. While the court has had some difficulty in its attempts to define the status of such a purchaser with relation to the title to the land purchased, it construed the statutes as giving him all the benefits of ownership, even holding that he was not required to account for the rents and profits received between the time of sale and the subsequent redemption of the property therefrom by the original owner. *Debenture Corporation v. Warren*, 9 Wash. 312 (37 Pac. 451); *Hardy v. Herriott*, 11 Wash. 460 (39 Pac. 958); *Knipe v. Austin*, 13 Wash. 189 (43 Pac. 25); *Hays v. Merchants' National Bank*, 14 Wash. 192 (44 Pac. 137); *State ex rel. Steele v. Northwestern & P. H. Bank*, 18 Wash. 118 (50 Pac. 1023); *Diamond v. Turner*, 11 Wash. 192 (39 Pac. 379). In the last case cited it was held no objection to the validity of a sheriff's deed that the judgment debtor in whose name it was issued had died between the time of sale and the execution of the deed by the sheriff, the court saying:

"The other [objection] is that the deed executed in pursuance of the sale was void for the reason that it was executed in the name of a dead man. It is no doubt true that a deed so executed could have no force whatever, but it does not follow that no title was acquired by the purchaser at the execution sale. The certificate of purchase

and confirmation of sale were alone essential to pass the substantial title of the defendant in the execution to the purchaser at the sale. The execution of the deed after the time for redemption had expired was a purely ministerial act on the part of the officer, and could have been compelled by the purchaser, or those claiming under him, at any time in a proper proceeding for that purpose."

A proceeding which, if valid, will give to an execution purchaser of land a substantial title, as well as all the rights and privileges which follow title, ought, when invalid, if pursued in good faith under a belief and claim of right, to give color of title sufficient to start in motion the statute of limitations; and in the case before us we are constrained to hold that the sheriff's sale conferred on the appellant such color of title as to enable it to claim the benefit of the statute involved here.

It follows that the judgment appealed from must be reversed, and the cause remanded with instructions to enter a judgment for the appellant in accordance with the prayer of its complaint, and it is so ordered.

HADLEY, ANDERS, MOUNT and DUNBAR, JJ., concur.

32 464
684 564

[No. 4701. Decided August 7, 1903.]

JAMES P. GLEASON, *Appellant*, v. J. E. HAWKINS, *Administrator, et al., Respondents*.

MORTGAGES — DEATH OF MORTGAGOR — LIMITATION ON FORECLOSURE.

A mortgage lien upon real estate, being capable of enforcement against the successors in interest of a deceased mortgagor, without the intervention of probate proceedings, an action to foreclose would be governed by the general statute (Bal. Code, § 4797) limiting right of action to six years.

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Argument of Counsel.

SAME — ENFORCEMENT AGAINST PERSONAL REPRESENTATIVE — LIMITATIONS.

Bal. Code, § 4810, which authorizes action within one year after the issuance of letters testamentary or of administration, in cases where the debtor died before the bar of the statute had intervened, is superseded by the later enactment of Id., § 4642, which provides that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of death of such decedent," and hence mortgage foreclosure proceedings against a decedent's realty, brought within one year after the issuance of letters, but not until twenty years after the mortgagor's death, were barred.

SAME — CLAIM AGAINST MORTGAGOR'S ESTATE.

Although the right of a creditor to enforce a mortgage lien against a decedent may be barred within six years, he is entitled to its allowance as a claim to be paid out of the decedent's personal estate, when duly presented to the administrator, notwithstanding the fact that a period of twenty years may have elapsed between the death of the mortgagor and the appointment of his representative.

SAME — PARTIES DEFENDANT — ESTOPPEL OF PLAINTIFF TO DISPUTE INTEREST.

Where a mortgagee makes parties defendant to his action for foreclosure and seeks relief against them, under the allegation that they claim some interest in the premises inferior to his own, they have a right to insist that he set up a valid cause of action in himself before being called upon to plead their own title.

Appeal from Superior Court, King County.—Hon. ROBERT B. ALBERTSON, Judge. Reversed in part.

Roberts & Leehey, for appellant.

John F. Dore and *Kenneth Mackintosh*, for respondents:

Upon the point that the action was begun too late, because no administration was had upon the estate of the maker of the note and mortgage until more than eighteen years after his death and because plaintiff made no attempt

to collect his claim for more than twenty-one years after it arose, counsel cite *Bauserman v. Charlott*, 26 Pac. 1051; *Bauserman v. Blunt*, 147 U. S. 647 (37 L. ed. 316); *Kulp v. Kulp*, 21 L. R. A. 550; *Spokane County v. Prescott*, 19 Wash. 418.

The plaintiff cannot now foreclose his mortgage, he having been able to begin his action against the heirs of this mortgagor over eighteen years ago. *Anrud v. Scandinavian-American Bank*, 27 Wash. 16; *George v. Butler*, 26 Wash. 456; *Denny v. Palmer*, 26 Wash. 469; *Raymond v. Bales*, 26 Wash. 493; *Hanna v. Kasson*, 26 Wash. 568.

The opinion of the court was delivered by

FULLERTON, C. J.—The appellant, plaintiff below, brought this action to foreclose a mortgage upon certain real property situated in King county, Washington. The action was commenced January 23, 1903. Demurrers to the complaint were interposed by the several defendants and sustained by the court, whereupon the appellant declined to plead further, and a judgment of dismissal of the action was entered, from which this appeal is taken. In his complaint the appellant alleged in substance that on March 5, 1881, at Portland, Oregon, one Albert Carr made and delivered to Mary H. Carr his promissory note for \$60.00, due six months from date, and secured the same by a mortgage upon the real property above mentioned; that the mortgagor died at Portland, Oregon, within three years from the time of the maturity of the note, and no administration of his estate in that state was ever had; that no administration on his estate was had in this state until December 5, 1902, when the respondent, Hawkins, was appointed such administrator. It was further alleged that no part of the principal or interest

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due upon the note had ever been paid; that the note and mortgage were duly assigned to the plaintiff; that the same, together with the mortgage, was presented to the administrator as a claim against the estate of Albert Carr, deceased, and by the administrator rejected. The eighth paragraph of the complaint is as follows:

“That the defendants herein named, Charles D. Knight, Cassen Dana Knight, Annie M. Brown, Charles D. Knight, as administrator of the estate of John A. Stafford, deceased, and Annie M. Brown and A. L. Brown, as executrix and executor of the estate of Amos Brown, deceased, Mrs. F. J. Anderson and John Doe Anderson, her husband, have or claim to have some interest or claims upon said premises or some part thereof, which interest or claims, however, if any exist, are wholly subsequent in date and inferior to plaintiff's mortgage and subject to the lien thereof.”

The prayer is that the appellant have judgment against the estate of Albert Carr, and against the respondent J. E. Hawkins, as administrator thereof, for the amount due on the note, that the mortgage be foreclosed and the property therein described be sold to satisfy the amount found to be so due, and that the claims or interests of the other defendants in the property be adjudged inferior to the lien of the mortgage. The demurrers were sustained on the ground that the action was barred by the statute of limitations, and the correctness of this ruling is the principal question presented in the argument here.

By reference to the dates above given it will be noticed that over twenty years had elapsed between the maturity of the note and the time any proceeding was commenced looking to its enforcement. It is the contention of the respondents that the right to enforce it after this lapse of time is barred both by the general statute of limitations,

which requires that an action upon a contract in writing, or liability expressed or implied arising out of a written agreement, be commenced within six years after the cause of action accrued, and by the special statute of 1895, which provides that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from date of the death of such decedent. Code, §§ 4798, 4642 (Ballerger's). On the other hand, the appellant claims that his right of action is saved by virtue of the provisions of § 4810 of the Code (*Id.*), which provides:

"If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

The contention of the respondents, in so far as it relates to the right to foreclose the mortgage, or the right to enforce the payment of the debt out of any of the real property of the deceased debtor, we think is the correct one. A mortgage, while it is but a mere lien, and is but ancillary to the debt which it is given to secure, is capable of enforcement against the mortgaged property, though the mortgagor be deceased, in a direct suit brought for that purpose against the heirs of the mortgagor, or, rather, the person or persons in whom the legal title to the mortgaged property is vested at the time of the foreclosure; that is, it is not necessary, in order that the mortgaged property may be subjected to the payment of the debt it is pledged to secure, that a probate procedure be instituted, and the debt be presented to the executor or administrator, before a suit can be instituted to foreclose the mortgage. *Scammon v. Ward*, 1 Wash. 179 (23 Pac. 439); *Reed v.*

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Miller, 1 Wash. 426 (25 Pac. 334). And as the right to subject the mortgaged property to the payment of the mortgaged debt is not affected by the death of the mortgagor, it follows that the statute would run against the right, and that the action must be begun within the statutory period. *Hibernian Savings & Loan Society v. Conlin*, 67 Cal. 178 (7 Pac. 477). But if this were not so, the present mortgage is barred in any event by the statute of 1895 above cited. That statute is subsequent in time to the one relied upon by the appellant, and clearly exempts the real estate of every deceased person from the payment of his debts, unless letters testamentary or of administration be granted within six years from the date of the death of such person. Here over twenty years elapsed between the death of the mortgagor and the grant of letters of administration, and "To hold that real estate of a deceased person, under said act, is liable for debts of any class,—either of those contracted by decedent before his death, or those contracted after for funeral expenses, or in administration, after the six years had expired,—would be to defeat the object of the act." *In re Smith's Estate*, 25 Wash. 539, 543 (66 Pac. 93). The court, therefore, did not err in holding that the real property mentioned could not be subjected to the mortgage debt.

But, notwithstanding the right to foreclose the mortgage or collect the debt out of the real property of the deceased debtor is barred by the statute, the creditor still has, we think, the right to have his claim allowed by the administrator to be paid, as other claims of the estate must be paid, out of the personal property in the hands of the administrator belonging to the estate. The statute destroys the lien of the debt at the end of six years upon the deceased debtor's real property, but keeps it alive in

so far as his personal property is concerned. The debt should, for that reason, have been allowed as a claim against the estate.

The appellant contends, however, that these questions cannot be raised by the respondents other than the administrator. He argues that, inasmuch as the only reference made to such respondents is by the paragraph above quoted in full, it does not appear on the face of the complaint that they have any such interest in the premises as will entitle them to question the appellant's right to foreclose; that they must first set up a superior title in themselves before they can question the sufficiency of his complaint. But it is a sufficient answer to this objection to say that the appellant has made them parties to the action, and sought relief against them. This is a confession that they are proper parties, and they have the right to insist that the appellant set up a valid cause of action in himself before they are called upon to plead their own title.

It follows, therefore, that the judgment appealed from must be affirmed as to all of the defendants except the administrator; as to him it must be reversed, and remanded with instructions to allow the claim of the appellant as one of the acknowledged debts of the estate, to be paid in due course of administration. The remittitur will go accordingly.

HADLEY, ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 4735. Decided August 7, 1903.]

32 471
41 238

*In the Matter of the Application of FRITZ DIETRICK for
a Writ of Habeas Corpus.*

STATUTES — REPEAL BY IMPLICATION — SETTING FORTH STATUTE AS
AMENDED — GAMBLING.

Section 37 of article 2 of the state constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length," does not apply to cases where a later act, designed as a complete law in itself, repeals by implication a former law on the same subject, and hence Laws 1903, p. 63, making gambling a felony is not invalid by reason of the failure to set it forth as an amendment of Bal. Code, § 7260, which defines the same acts of gambling as constituting a misdemeanor.

Original Application for Habeas Corpus.

Graves & Graves, for petitioner.

Horace Kimball, Prosecuting Attorney, *W. B. Stratton*, Attorney General, *E. W. Ross* and *C. C. Dalton*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—The petitioner applied to this court for a writ of habeas corpus. The petition states substantially that the petitioner is restrained of his liberty by the sheriff of Spokane county, in the county jail of said county, and that such restraint is because of the facts hereinafter stated. On June 16, 1903, an information was filed in the superior court of said county, by the prosecuting attorney thereof, charging that the petitioner did, on the 14th day of June, 1903, wilfully, unlawfully, and feloniously conduct and carry on therein, as proprietor, a certain game of poker, commonly called "stud poker," the same having been played and operated for checks, said

checks then and there being representatives of value, towit, representatives of money, and that said game was played, carried on, and conducted in a certain room where persons resort for the purpose of playing the same. Thereafter the petitioner was brought before said court and required to plead to said information. He thereupon entered a plea of guilty, and, on the 17th day of June, 1903, the court entered its judgment and sentence in the cause, finding petitioner guilty of the offense charged, and sentencing him as a punishment therefor to serve a term of one year in the state penitentiary. He was forthwith remanded to the custody of said sheriff, that said judgment and sentence might be carried into effect. The petition further avers that the petitioner is held upon no other charge or pretense than that above set forth. He admits that he has committed the offense charged in the information, but says that the only punishment which can be imposed therefor is a fine, as provided in § 7260, Bal. Code. He avers that he so claimed and asserted to the said, superior court at the time the sentence was pronounced, but that the court disregarded his protest and sentenced him to imprisonment in the penitentiary. He alleges that the said sheriff of Spokane county will in a short time proceed to carry out said sentence, and will commit him to the custody of the warden of the penitentiary to serve out the term imposed by said court. He further says he has stood and now stands ready to pay a fine, and he prays that he may be delivered from illegal imprisonment, and that an order of final discharge shall be made herein. Upon the presentation of the petition here, it was ordered that a writ of habeas corpus should issue directed to the said sheriff of Spokane county. Such a writ was accordingly issued. The said sheriff filed his return, in which he set

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up the record of the judgment in the superior court, together with the commitment remanding the petitioner to his custody for the purpose of being delivered to the warden of the penitentiary. A hearing was thereafter had upon said petition and return.

The contention of the petitioner involves the constitutionality of an act of the legislature of 1903. The act will be found in chapter 51, at pages 63 and 64 of the Session Laws of 1903, and is entitled as follows: "An act to prohibit the maintaining of gambling resorts, declaring the same a felony, and prescribing a penalty therefor." The act itself is as follows:

"Section 1. Any person who shall conduct, carry on, open, or cause to be opened, either as owner, proprietor, employee, or assistant, or in any manner whatever, whether for hire or not, any game of faro, monte, roulette, rouge et noir, lansquenette, rondo, vingt-un (or twenty-one), poker, draw-poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice or any other device, or any slot machine, or other gambling device, whether the same be played or operated for money, checks, credits, or any other representative or thing of value, in any house, room, shop, or other building whatsoever, boat, booth, garden or other place, where persons resort for the purpose of playing, dealing or operating any such game, machine or device, shall be guilty of a felony, and upon conviction thereof shall be imprisoned in the penitentiary for the period of not less than one nor more than three years."

The claim of the petitioner is that the act is invalid for the alleged reason that it is merely amendatory of a former act dealing with the same subject, and that as such it does not comply with § 37, art. 2, of the state constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised

or the section amended shall be set forth at full length." The former act of which it is claimed the recent one is merely amendatory was passed by the territorial legislature of 1879, and is entitled, "An act to prevent and punish gambling." Section 1 of that act is involved in the discussion here, and will be found at page 97 of the Session Laws of 1879, being also § 7260, Bal. Code. The section is as follows:

"Each and every person who shall deal, [play], or carry on, or open, or cause to be opened, or who shall conduct, either as owner, proprietor, employee, whether for hire or not, any game of faro, monte, roulette, rouge-et-noir, lansquenette, rondo, vingt-un (or twenty-one), or poker, draw poker, brag, bluff, thaw, tan, or any banking or other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than five hundred dollars, and shall be imprisoned in the county jail until such fine and costs are paid: Provided, That such persons so convicted shall be imprisoned one day for every two dollars of such fine and costs: And provided further, That such imprisonment shall not exceed one year: And still further provided, That any one who shall carry on any chuck-a-luck, bunko, strap, sling, panel house, or other swindling games shall be deemed guilty of a felony, and upon conviction shall be imprisoned in the penitentiary not exceeding five years for such offense."

The petitioner argues that the new act deals with the same subject as the above quoted section of the former one, is merely amendatory thereto, and is invalid because it does not set forth at full length the former section as amended as provided by the constitutional provision quoted above. The question, therefore, to be determined is, does

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the new act come within the said constitutional requirement?

It will be seen that, under the act of 1879, the carrying on and conducting of certain enumerated gambling games is made a distinct offense, as a misdemeanor. The new act, it is true, deals with the subject of conducting and carrying on gambling games. It enumerates the same games that were named in the former act, to conduct which was a misdemeanor, and provides that the act of conducting and carrying them on shall be a felony, and punishable by imprisonment in the penitentiary when conducted "where persons resort for the purpose of playing." While the later act does in effect deal with the same subject as the former, yet it is complete and independent in itself. It in no way refers to any former law, and such reference is unnecessary in order to understand its full meaning. It clearly designates certain acts as felonies, and provides for their punishment. No further search is required to find the law on the particular subject of which the act treats. Being complete in itself, and in no way dependent upon any other statute to give it meaning or force, it stands alone as the law upon the particular subject of which it treats. As such, being the latest law on the subject, it repeals by implication all former statutory provisions in conflict with it. That a statute may in its effect modify or be in conflict with a former one because it deals with the same subject-matter does not necessarily make it an amending statute, within the meaning of the constitutional provision invoked here. That provision was evidently intended to prevent the evil of seeking to amend a former law in such a manner that the entire law upon the subject treated by the amendment cannot be known without reference to the former law.

It was therefore wisely provided that in the case of such an amendment the former law as amended shall be fully set out, in order that the full force and significance of the amendment may be at once seen and understood, without reference to the former act. But when an act is independent and complete in itself, though it has the effect to modify a former law, this constitutional provision, or a similar one, is held in many states not to apply, and such statutes are held not to be within the mischief intended to be remedied. *State v. Cain*, 8 W. Va. 720; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *State ex rel. Maguire v. Draper*, 47 Mo. 29; *Evernham v. Hulit*, 45 N. J. Law, 53; *Clark v. Finley*, 93 Tex. 171 (54 S. W. 343); *Home Ins. Co. v. Taxing District*, 4 Lea, 644; *Anderson v. Commonwealth*, 18 Grat. 295; *Davis v. State*, 7 Md. 151 (61 Am. Dec. 331); *Warren v. Crosby*, 24 Ore. 558 (34 Pac. 661); *Denver Circle Ry. Co. v. Nestor*, 10 Colo. 403 (15 Pac. 714); *State v. Gerhardt*, 145 Ind. 439 (44 N. E. 469, 33 L. R. A. 313); *State ex rel. Bragg v. Rogers*, 107 Ala. 444 (19 South. 909, 32 L. R. A. 520); *Little Rock v. Quindley*, 61 Ark. 622 (33 S. W. 1057); *Hellman v. Shoulters*, 114 Cal. 136 (44 Pac. 915); *State ex rel. Turner v. Hocker*, 36 Fla. 358 (18 South. 767); *Lehman v. McBride*, 15 Ohio St. 573; *People ex rel. Klokke v. Wright*, 70 Ill. 388. Many of the above decisions declare that this constitutional provision does not abolish the long established rule of repeal by implication, when the new act is complete in itself, and does not depend upon former legislation to make it clear and intelligible. This court has held that a statute may be repealed by implication in this state. *State ex rel. Whatcom County v. Purdy*, 14 Wash. 343 (44 Pac. 857). Many of the decisions cite and quote from the opinion of Mr. Justice

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COOLEY in *People v. Mahaney, supra*. The effect of the rule contended for by the petitioner here is so comprehensively stated by that eminent jurist that we quote at length from that opinion as follows:

"If, whenever a new statute is passed, it is necessary that all prior statutes, modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the state would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. If, because an act establishing a police government modifies the powers and duties of sheriffs, constables, water and sewer commissioners, marshals, mayors and justices, and imposes new duties upon the executive and the citizen, it has thereby become necessary to re-enact and republish the various laws relating to them all as now modified, we shall find, before the act is completed, that it not only embraces a large portion of the general laws of the state, but also that it has become obnoxious to the other provisions referred to, because embracing a large number of objects, only one of which can be covered by its title.

"This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief de-

signed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

The petitioner insists that there are two lines of decisions upon this constitutional provision, one holding that it applies only to the form of the new law and that it does not apply to an act which in terms does not purport to be amendatory to a former one, while the other holds to the rule that it applies to substance as well as to form, and reaches an act that in effect is amendatory, although it may be independent in form, and contains no words showing an intention to amend. It is true, such a distinction appears to be made by some of the decisions. *State v. Guinney*, 55 Kan. 532 (40 Pac. 926), is cited in support of the rule that substance, and not form, must be observed in the application of this constitutional principle. The decision, in effect, seems to so hold, but at the same time the court says that "the constitutional clause in question was not intended to abolish the doctrine of repeals by implication." As being to the same effect, petitioner cites *Sovereign v. State*, 7 Neb. 409, and *State v. Beddo*, 22 Utah, 432 (63 Pac. 96). Other Nebraska and Utah cases are also cited, and the reasoning of the *United States v. Claflin*, 97 U. S. 546, is urged as supporting the rule. Whatever may be said of these decisions, we think the undoubted weight of authority in the different states supports the rule that, when a statute is so constructed that it requires no reference to another to determine its meaning and scope, the constitutional rule invoked does not apply.

The petitioner, however, insists that this court is committed to the doctrine that in all cases when a new act, in effect, amends another, the constitutional provision must apply. *Copland v. Pirie*, 26 Wash 481 (67 Pac.

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227, 90 Am. St. Rep. 769), is cited in support of this contention. In that case the court was considering an act relating to exemptions of personal property, passed by the legislature of 1897. Session Laws 1897, p. 93. Section 1 of the act provided that,

“There shall be exempt from execution and attachment to every householder in the state of Washington personal property to the amount and value of one thousand dollars (\$1,000) in addition to the property exempt under section 486 of volume 2 of Hill’s Statutes and Codes of the State of Washington.”

A glance at the above language shows that an exemption of \$1,000 to every house holder was intended, but it shows equally as conclusively that other exemptions were also intended; and it is utterly impossible to tell what the other exemptions are, without reference to a former statute, which statute is specifically referred to in the new act as containing the necessary additional information. To determine what exemptions could be claimed by any householder required an examination of both statutes. It is true, the new act did not in express words say that it was intended to be amendatory to the former, but it did expressly refer to the former in such a manner as to show that it could not stand alone and be intelligently applied without being read in connection with the former. It was in all respects as amendatory to the former law and as dependent upon it as if it had said it was an act to amend the former. It seems to us now, as it did then, that such a statute comes directly within the evil sought to be prevented by the constitutional provision. Counsel for the petitioner earnestly urge that *Copland v. Pirie, supra*, is decisive of this case in the petitioner’s behalf, but we as earnestly believe that it is by no means in principle like the case now before us. We

have already seen that the statute now under examination is entirely independent. It refers to no other law, and no further search is required to learn what is the entire law upon the exact subject of which it treats. As the latest legislative expression, it repeals by implication any former provisions in conflict with it.

We conclude that it is not such an act as comes within the constitutional rule urged here. The petitioner is therefore remanded to the custody of the sheriff of Spokane county for the purpose of carrying into effect the judgment of the superior court hereinbefore mentioned.

FULLERTON, C. J., and ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 4612. Decided August 8, 1903.]

BANK OF MONTREAL, *Appellant*, v. JAMES A. BUCHANAN,
Respondent.

EXECUTORS — EXECUTION OF RENEWAL NOTES — LIABILITY OF COMMUNITY ESTATE.

A community estate would not be rendered liable by the execution of renewal promissory notes by one of the spouses after the death of the other, whether such notes were executed in his capacity as executor or as a survivor of the community.

SAME — ACTION ON CLAIMS — LIMITATIONS.

The limitation in § 4798, Bal. Code, against right of action upon contracts in writing after the expiration of six years is not extended in case of the death of a debtor by the provisions of Id., §§ 6226, 6228, requiring notice to creditors and the presentment of claims within one year thereafter, as the latter sections give that right only to claims not already barred by the general statute of limitations.

SAME — RIGHT OF ACTION AGAINST DECEDENT'S ESTATE.

An action may be commenced against the personal representative of a deceased debtor, even after the statute of limitations

Aug. 1903.]

Argument of Counsel.

has run against the debt, under Bal. Code, § 4816, which provides that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."

SAME — QUALIFICATION OF EXECUTOR — ISSUANCE OF LETTERS — ACTIONS AGAINST — WHEN BAR BEGINS TO RUN.

Under Bal. Code, § 6200, an executor is qualified to act as such and take charge of the estate when his bond is filed, whether letters testamentary have been issued or not, and hence the running of the year allowed by Id., § 4810, for the commencement of action against the executor would date from the time of his qualification, although letters were not issued until a subsequent date.

SAME — LACHES OF CREDITOR — NOT EXCUSED BY EXECUTOR'S NEGLECT OF DUTIES.

The fact that an executor failed to proceed with the administration of an estate would not excuse a creditor who allowed his claim to become barred by reason thereof, inasmuch as the creditor had a remedy under Bal. Code, §§ 6167, 6168, whereby he could have enforced administrative proceedings.

Appeal from Superior Court, San Juan County. — Hon. GEORGE A. JOHNS, Judge. Affirmed.

Fitch & Harris, for appellant:

The new notes bear the same relation to the community property as did the old notes. Mr. Buchanan desired to pay the indebtedness without resorting to a sale of the real estate. He thought that if given time he would be able to do so, and thus preserve the real estate intact for the heirs. The extension was accordingly given and the new notes executed. They can in no sense be regarded as payment of the former, in the absence of an agreement to that effect. *First National Bank v. Lesser*, 58 Pac. 345; *Smith v. Smith*, 35 Pac. 697; *Holland Trust Co. v. Waddell*, 26

N. Y. Supp. 980; *Albright v. Griffin*, 78 Ind. 188; *Miller v. Hilton*, 88 Me. 429; *Boston National Bank v. Jose*, 10 Wash. 185; *North v. Walker*, 66 Mo. 453; *West v. Brison*, 99 Mo. 692. Mr. Buchanan had the power to bind the community by the execution of his extension notes during coverture without the knowledge or consent of his wife. *McKee v. Whitworth*, 15 Wash. 536. Manifestly, therefore, he had the power to do so after her death, where it was done in the direct interest of the community estate. "A second note given by a husband after the dissolution of the community by the death of his wife in renewal of a note which he had given before the dissolution of the community is not such a novation of the first note as will prevent the payee from enforcing its payment out of the community property." *Turner v. O'Neal*, 24 La. An. 543; *Rusk v. Warren*, 25 La. An. 314; *National Exchange Bank v. Wilgus Ex'r's*, 25 S. W. 2; *Bank of Louisiana v. Dejean*, 12 Rob. 16. The power possessed by a surviving husband or wife who qualifies to administer a community estate is much broader than that possessed by an ordinary administrator; and what such survivor may legally do in the exercise of that power will bind the estate. *James v. Turner*, 78 Tex. 241.

Appellant could not bring its action until the claim had been presented to the executor and by him rejected; and it was not required to present its claim until notice to creditors had been published. Where such notice had not been published, a claim would not be barred by any failure to present it. *Quivey v. Hall*, 19 Cal. 98; *Donnerberg v. Oppenheimer*, 15 Wash. 290; *McFarland v. Fairlamb*, 18 Wash. 606.

Aug. 1903.] Opinion of the Court.—HADLEY, J.

Jesse A. Frye and Thomas D. J. Healy, for respondents.

The opinion of the court was delivered by

HADLEY, J.—The appellant brought this suit and alleged that on November 25, 1890, James A. Buchanan and Mary E. Buchanan, his wife, were indebted to E. Bennett & Son in the sum of \$1,680, and that as evidence of such indebtedness the said James A. Buchanan executed and delivered to said E. Bennett & Son three promissory notes, each for \$560, maturing respectively on the 1st day of May in the years 1892, 1893, and 1894, which notes were afterwards transferred to appellant; that on or about June 22, 1892, said Mary E. Buchanan died, leaving a last will whereby the said James A. Buchanan was nominated as executor; that, on the 7th day of February, 1893, by an order of the superior court of San Juan county, said will was admitted to probate, and said James A. Buchanan was appointed as executor of said estate; that in accordance with the terms of said order he filed his bond as executor, but neglected to take out letters testamentary until the 7th day of May, 1901, and did not publish notice to creditors until May 16, 1901; that on the 13th day of August, 1897, said James A. Buchanan, for a valuable consideration, executed and delivered to appellant his three promissory notes for \$500 each, the same aggregating the full amount unpaid on the notes first above mentioned, and maturing respectively in one, two, and three years from date; that the last named notes were intended as renewals of the first ones; that during the time intervening between the maturity of the original notes and the said 7th day of May, 1901, appellant was negotiating with said James A. Buchanan for a settlement of said indebtedness, and that he repeatedly promised to pay the same,

stating that he desired to settle the claim without administering upon the estate, as he wished to avoid the expense of administration; that on July 18, 1901, the claim evidenced by said renewal notes, duly verified as required by law, was presented to said James A. Buchanan, as executor, and the same was indorsed as rejected. Judgment is demanded against James A. Buchanan, both as an individual and as executor, for the amount of such renewal notes, together with interest, attorney's fees, and costs. James A. Buchanan, as executor, separately demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, and also that the action is barred by the statute of limitations. The demurrer was sustained, and the cause dismissed as against the executor. This appeal is from that judgment.

It is suggested that the renewal notes declared upon in the complaint could have been signed by James A. Buchanan in but three possible capacities, viz., as an individual, as executor, or as survivor of a community. If the notes were signed by him in his individual capacity, then in that capacity only is he liable. The renewal notes did not purport upon their face to bind the estate, but in form appear to be the individual notes of James A. Buchanan. If, however, he undertook to sign them and intended to execute them in the capacity of executor, did they become obligations against the estate?

"An executor or administrator cannot impose any liability on the estate by making, drawing, accepting, or indorsing any bill or promissory note, though he has authority to indorse negotiable instruments for the purpose of transferring the decedent's title, when a transfer is necessary or proper. But such indorsement operates no further, so far as the estate is concerned, than to effect a transfer of title, and any liability which may arise on the

Aug. 1903.] Opinion of the Court.—HADLEY, J.

indorsement is the personal liability of the executor or administrator." 11 Am. & Eng. Enc. Law (2d ed.), p. 936.

Numerous decisions are cited in support of the above. It follows that the renewal notes, though the maker may have intended to execute them in the capacity of executor, did not create any new obligation against the estate, and its liability was not thereby enlarged. If the maker be considered as having executed the notes in the capacity of a survivor of a community, the same result follows. In this state, upon the death of either spouse, the entire community estate is subjected to administration. *Ryan v. Fergusson*, 3 Wash. 356 (28 Pac. 910); *Lawrence v. Bellingham Bay, etc., R. R. Co.*, 4 Wash. 664 (30 Pac. 1099). The estate could not, therefore, be at one and the same time under the control of the executor and also of the survivor of the community as such. Moreover, the community no longer exists after the death of one of the spouses, but its estate is simply held intact by administrative proceedings for the purpose of paying indebtedness created during its existence. The entity called the "community," is immediately dissolved upon the death of one of its members, and is in law as effectually dead as a deceased individual. What may be done by a survivor must therefore be done as an individual, and not as representing the community. As an individual the survivor can not enter into obligations binding upon the estate of the dead community. Viewed, therefore, from either of the three standpoints mentioned above, the renewal notes, considered as new and distinct obligations or contracts, are without force as against the estate. They were executed after an executor had charge of the estate, after the death of the community, and by their terms matured long after their date.

The allegations of the complaint are perhaps broad enough to be treated as declaring upon the indebtedness represented by the original notes. That indebtedness was created during the existence of the community. If the complaint be treated as based upon the original notes and the indebtedness of which they were evidence, we must next inquire if this action is barred by the statute of limitations. The general statute of limitations applicable to said notes provides that the action should have been brought within six years. Section 4798, Bal. Code. The last of the notes matured May 1, 1894, and the complaint in this action was verified May 2, 1902. It is clear, therefore, that the action is barred, unless the running of the statute has for some reason been suspended. It is argued by appellant that the death of Mary E. Buchanan and the subsequent administrative proceedings had that effect. It is insisted that the general statute of limitations no longer applied, but that the right to maintain the action was thereafter controlled by administrative statutes. Under the latter an executor or administrator is required to publish a notice to creditors, and claims must be presented within one year after the first publication of the notice, or they are barred. §§ 6226, 6228, Bal. Code. The appellant urges that until a notice to creditors was published it was under no obligation to move toward the enforcement of its claim, and that, since it promptly presented its claim after such notice was published, and followed with this suit, it is within the probate provisions above cited. The argument of appellant leads to the conclusion that the one year period fixed by the probate law for presenting claims has the effect to extend the general statute of limitations. We do not think it can be said to have that effect. It was rather intended merely to fix

Aug. 1903.] Opinion of the Court.—HADLEY, J.

a time within which claims not already barred by limitation statutes shall be presented. Whatever may operate to affect the general statute of limitations as against estates must be by virtue of § 4810, Bal. Code. That section provides:

“If a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration.”

Thus it will be seen that an action may be commenced against the personal representatives even after the statute of limitations has run. But it must be commenced within one year from the issuing of letters testamentary. Appellant concedes in its brief that under § 6200, Bal. Code, the executor was qualified to act as such, and take charge of the estate when he filed his bond. It is also conceded, and authorities are cited by appellant to the effect, that an executor derives his authority from the will, and that confirmation by the court, followed by filing the bond, is equivalent to taking out letters, the letters being but the authentic evidence of the power conferred by the will. It follows that this administration began in February, 1893, and § 4810, *supra*, therefore, affords appellant no relief in this case, since any extended right of action thereunder must have been limited to the year following the beginning of said administration. However, the statute had not then fully run against any of the indebtedness, and it could have been enforced long afterwards before the period of limitation expired.

The appellant alleges that the executor neglected to proceed with the administration, that it was meanwhile negotiating with him for the settlement of its claim, and that

he repeatedly promised to pay it. While this may be true, yet appellant was during all that time chargeable with the knowledge of its legal rights, and was also bound to know that the statute of limitations was constantly running against its claim. Having allowed the period of limitation to expire, its claim was thereafter barred. If the executor neglected his duty in failing to proceed with the administration, that was no reason why the appellant should remain idle and allow the statute to continue to run against its claim. The administration was initiated in 1893, eight years before appellant made any move to force the executor to proceed with the discharge of his trust. The complaint alleges that in May, 1901, appellant instituted proceedings to compel the executor to proceed, and that as a result thereof he did proceed with the administration. Such steps might have been taken by the appellant long before, and when no question as to the statute of limitations could have arisen. Under §§ 6167 and 6168, Bal. Code, the appellant could have brought to the attention of the court the fact that the executor was neglecting his duties, which must have led either to the discharge of his duties or to his removal and a new appointment. The appellant at all times had a clear remedy, and any inducements that may have led to the postponement of the use of the remedy did not affect the running of the statute of limitations.

We conclude that the demurrer was properly sustained, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 4618. Decided August 8, 1903.]

ELLA M. STANLEY, *Respondent*, v. SARAH E. STANLEY,
Appellant.

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APPEAL — SUFFICIENCY OF EVIDENCE.

Where there is substantial evidence in the record sustaining the verdict, though it be but the evidence of the person in whose favor the verdict was rendered, the supreme court has no rightful power to reverse the judgment for want of facts, no matter how strongly it may be convinced that the evidence preponderates with the other side.

HUSBAND AND WIFE — ALIENATION OF AFFECTIONS — ACTION BY WIFE — EVIDENCE.

In an action for the alienation of her husband's affections, where it was not contended by the plaintiff, either in her complaint or evidence, that any one act of the defendant caused the separation of herself and husband, it was not error for the court to refuse to permit cross-examination of plaintiff requiring her to name some one act which caused the separation.

SAME.

In such an action, the complaint in a prior action by the husband for divorce was admissible in evidence as a declaration of the defendant, where the attorney who drew it up had already testified that he procured the facts therefor from the defendant in the present action.

SAME — INSTRUCTIONS — ELEMENTS OF DAMAGE — LOSS OF SUPPORT.

A charge to the jury in such a case that they might consider loss of support as an element of damage was not erroneous, although there had been no direct evidence as to its money value, when there was evidence before the jury showing the circumstances and conditions in life of the husband and wife.

SAME — EXCESSIVE DAMAGES.

A verdict for \$3,500 for the alienation of a husband's affections is not so excessive as to appear to be the result of passion and prejudice on the part of the jury.

VERDICT — IRREGULARITY.

A verdict will not be set aside by reason of the fact that it had been obtained by computation, through the process of adding

together the amounts favored by each individual juror and dividing the total by twelve, where it does not appear that an agreement was entered into by the jurors in advance to so agree upon a verdict.

Appeal from Superior Court, King County.—Hon. GEORGE E. MORRIS, Judge. Affirmed.

A. G. McBride, for appellant.

W. F. Hays, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The respondent brought this action in the court below to recover from the appellant and William M. Stanley damages for alienating her husband's affections. On the trial she recovered a substantial judgment against both defendants, from which an appeal was taken to this court, which reversed the judgment, and remanded the cause, with instructions to grant a nonsuit as to William M. Stanley, and to retry the cause as to the appellant. *Stanley v. Stanley*, 27 Wash. 570 (68 Pac. 187). The cause was retried, as directed, and resulted in a verdict and judgment against the appellant for the sum of \$3,500. This appeal is from that judgment.

The first error assigned, and the one to which the argument both in the brief and at the bar was principally directed, is that the evidence is insufficient to justify the verdict. We have examined the some eight hundred pages of the record devoted to a statement of the evidence, and while we can see how the jury could well have found that the weight of the evidence was with the appellant, we cannot say there was no substantial evidence sustaining the respondent's case. Indeed, if the respondent's testimony was to be believed (and that was a matter solely for the jury to determine), the appellant was the sole cause of her

Aug. 1903.] Opinion of the Court.—Fulleton, C. J.

husband's loss of affection for her, and the cause of his subsequent abandonment of herself and her child. While there is not much evidence corroborative of her statements, none is required to sustain the verdict in this court. We are not permitted to retry the facts. If there is substantial evidence in the record sustaining the verdict and judgment, though it be but the evidence of one witness, and that witness the person in whose favor the verdict and judgment is rendered, we have no rightful power to reverse the judgment for want of facts, no matter how strongly we may be convinced that the evidence preponderates with the other side. On this question, therefore, the appellant is concluded by the finding of the jury.

Of the assignments which are thought to require a retrial of the cause, the first is that the court erred in sustaining objections to the following questions asked the respondent on her cross-examination, viz.: "Now I wish you would state to this jury one single act on the part of this defendant, Mrs. Stanley, whereby she caused a separation between you and your husband?" "Can you name any one act on behalf of this defendant that caused the separation of you and John?" The court sustained objections to these questions, we think rightly, on the ground that they were too general to support any of the issues. The respondent did not contend, either in her complaint or in her evidence in chief, that any one act of the appellant caused the separation of herself and husband, but she alleged and testified to a series of acts and circumstances, covering a considerable period of time, and it was the sum of these that she relied upon as sustaining her claim that her husband's affection had been alienated by the appellant. But had it been proper to have required her to answer the questions, her answers could not have

enlightened the jury in any way. The jury then knew that she could not name any such act, and knew, moreover, that she did not profess or pretend to be able to do so. When a fact which, from its nature, cannot be contradicted is once fairly presented to a jury, it is not error to refuse to permit subsequent repetitions of it.

The court in charging the jury stated to them that they might consider loss of support as an element of damage in case they found for the respondent; carefully instructing them as to the time her right to such support ceased. It is objected to this that there was no evidence before the jury tending to show the value of such support, and that any estimate as to its value by the jury would be mere conjecture. It is true no one stated in dollars and cents what the value of such support would be, but we cannot think for that reason there was no evidence at all on the question. The surrounding circumstances and conditions in life of the husband, as well as those of the respondent, were very fully shown, and from these the jury were just as capable of forming an estimate of the loss as any individual could possibly be. It was not a matter that called for expert testimony.

The trial court permitted the respondent to read to the jury a complaint in the action for divorce brought in the name of the respondent's husband against her, after the attorney who drew the complaint had testified that he obtained the facts recited therein from the appellant, and had instituted the action at her solicitation. It is urged that to admit the complaint in evidence was error. But we think not. It was permissible for the attorney who drew the complaint to testify who employed him to draw the complaint, and who furnished him with the facts therein recited. *Stanley v. Stanley*, 27 Wash. 570 (68

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Pac. 187). The complaint, therefore, was admissible as a declaration of the appellant.

It is next urged that the verdict was a chance or quotient verdict, and that the motion for a new trial should have been granted for that reason. It does appear by the affidavit of one of the jurors and the statement of another, shown by the affidavit of counsel, that the jury, in the course of their deliberation, after they had agreed to return a verdict for the respondent, set down the amount each individual juror favored returning, added the amounts together, and divided the total by twelve; but it does not appear that they agreed in advance to return as their verdict the sum that should be thus obtained, nor did they, in fact, return such a sum as their verdict, though, perhaps, the verdict was very nearly one such amount. This is insufficient to authorize the setting aside of the verdict. Courts have held that where the jurors agree in advance of the process to return the result as their verdict, and afterwards do so, that the verdict ought not to be allowed to stand. But it is not a valid objection to a verdict that it was the result of this or some other method of computation, if it finally receives the sanction of the necessary number of jurors required to return a verdict. *Watson v. Reed*, 15 Wash. 440 (46 Pac. 647, 55 Am. St. Rep. 899).

It is next said that the verdict is excessive, and was given under the influence of passion and prejudice; but we find nothing in the record to sustain these contentions. The amount returned was not immoderate when compared with verdicts in similar cases, and we see nothing in the evidence or the circumstances surrounding the parties which even tends to show that the verdict was not the result of the honest conviction of the jury.

Lastly, it is insisted that the evidence shows a full and complete settlement of the cause of action prior to the commencement of the action, and that this court ought to reverse the cause, and direct a judgment for the appellant, for that reason. But here again the evidence was conflicting, and the finding of the jury on conflicting evidence, we repeat, is conclusive upon this court.

The judgment appealed from is affirmed.

HADLEY, ANDERS, DUNBAR and MOUNT, JJ., concur.

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[No. 4627. Decided August 8, 1903.]

CHARLES K. METLER, *Appellant*, v. MATTIE E. METLER,
Respondent.

DIVORCE — VACATION OF DECREE.

Under Bal. Code, § 4880, which provides that in judgments based upon service by publication, the defendant may, "except in an action for divorce," be allowed to defend within one year after judgment, the court has no power to vacate a decree of divorce, where there was no want of jurisdiction, nor fraud practiced in the procurement of the decree.

SAME.

The general statutes on the subject of vacation of judgments (Bal. Code, § 4953 *et seq.*), which make no restriction in the case of divorce decrees is superseded in so far as they conflict, by the later enactment of Id., § 4880, which forbids the opening up of decrees of divorce.

SAME — VOID ORDER FOR ALIMONY — CONTEMPT.

A judgment convicting plaintiff of contempt for failure to comply with the order of the court requiring him to pay alimony and suit money was erroneous, where such order was made after the court had wrongfully attempted to vacate a decree of divorce and allow the defendant to interpose a cross-complaint.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Reversed.

Aug. 1903.] Opinion of the Court.—FULLERTON, C. J.

Herbert E. Snook, for appellant.

John G. Gray and *Byers & Byers*, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—On January 17, 1902, the appellant obtained a decree of divorce from the respondent in an action in which no personal service of summons was had, the summons being served by publication. The proceedings were in all respects regular; there was a return by the sheriff on the summons to the effect that the defendant could not be found in his county; an affidavit for publication, stating the facts necessary to authorize a publication of summons; proof that the summons had been published for the required time; a default after the time for appearing had expired; and a decree rendered for a cause distinctly stated in the complaint, based on facts found by the court after a trial in which the prosecuting attorney of the county participated. Later on the respondent moved to vacate the decree, and for leave to answer; basing the motion on the files and records of the cause, and on the affidavit of the respondent filed with the motion. The affidavit set out matters which, if found to be true by the court, might have warranted it in vacating the decree, in the exercise of its judicial discretion, were the case one in which a judicial discretion in that regard could be exercised; but it alleged nothing tending to show a want of jurisdiction of the subject-matter, or want of authority to render the particular decree. The appellant appeared and resisted the motion for want of jurisdiction of the court to entertain it. The court, however, overruled his objections, and entered an order vacating the decree and allowing the respondent to answer. An answer was thereupon filed, together with a cross-complaint, in which the

respondent sought a decree of divorce. She also prayed for temporary alimony and attorneys' fees and suit money, all of which the trial court awarded her. The appellant refused to pay these awards, and was cited to appear and show cause why he should not be punished for contempt. He appeared, but failed to make a showing satisfactory to the court, and was found guilty of contempt, and sentenced to be imprisoned in the county jail for a period of thirty days. This appeal is from the last mentioned order.

Of the errors assigned, we have found it necessary to consider but one, namely: the power of the court to vacate the decree of divorce. The Code (Ballinger's, § 4880) provides:

"If the summons is not served personally on the defendant in the cases provided in the last two sections, he or his representatives, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action and, *except in an action for divorce*, the defendant or his representative may in like manner be allowed to defend after judgment, and within one year after the rendition of such judgment, on such terms as may be just;"

It is evident that it was the intention of the legislature by this section to limit the right of a defendant to defend in an action for divorce to a time prior to the entry of the judgment, while it continued the right to defendants in other actions for a period of one year after that time. This means that the trial court has no control over an action for divorce after it has once rendered a decree therein; that while it may vacate judgments in other actions, for good cause shown, if application be made to it within one year, it has no such power over a judgment rendered in an action for divorce. The court can, of course, lawfully vacate such

Aug. 1903.] Opinion of the Court.—FULLERTON, C. J.

a decree when entered without jurisdiction, and perhaps where it is the result of fraud practiced on the court or the other spouse, but for reasons which ordinarily call for the exercise of a mere judicial discretion it has no such power. The reasons for making this distinction between judgments in this particular action and judgments in ordinary actions are apparent. A decree of divorce affects the status of the parties, both with respect to their relations to one another and their relations to the public. By the terms of the statute, divorced persons may lawfully marry after a limited time from the rendition of the decree, and to permit its vacation is to make it possible, under the guise of law, to inflict injury and suffering upon persons whose innocence entitles them to every protection the law can afford. It is therefore highly important, not only for the sake of the parties thereto, but also for the sake of such persons, that decrees of divorce should not be granted except for specific causes provided by law, proved and found by the court, in actions where the court has undoubted jurisdiction over the subject-matter and the parties; but it is also equally important that the decree, when once granted, be not disturbed by the court granting it. The construction we now put upon the statute is in accord with that given it by this court in *McCord v. McCord*, 24 Wash. 529, 534 (64 Pac. 748).

The respondent urges, however, that there are other sections of the statute which provide for the vacation of judgments which make no mention of the restriction contained in this section, and hence the order can be sustained as a proceeding under those sections. But § 4880, above mentioned, was enacted subsequent in time to the other sections referred to by the respondent, and must be held to supersede them in so far as it conflicts with them. In this re-

spect it does so conflict, and eliminates decrees of divorce from their operation.

It follows, of course, if the court was without power to vacate the decree of divorce, its order in that respect was void, and its subsequent order for alimony and suit money equally so. The appellant could not be in contempt for refusing to comply with a void order (*State ex rel. News Pub. Co. v. Milligan*, 3 Wash. 144 (28 Pac. 369)), and hence the judgment of conviction was erroneous.

The judgment appealed from is reversed and the cause remanded, with instructions to enter a judgment finding the defendant not guilty of the contempt charged.

HADLEY, ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 4767. Decided August 8, 1903.]

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THE STATE OF WASHINGTON *on the Relation of Stetson & Post Mill Company v. SUPERIOR COURT OF KING COUNTY.*

PROHIBITION — REMEDY BY APPEAL.

Prohibition will not lie to restrain a superior court from entering a judgment logically flowing from its findings, even if the legal operation of a former judgment in the case as *res judicata* is thereby destroyed, since such action of the court would amount to error for which there is a remedy by appeal.

Original Application for Prohibition.

J. W. Rayburn and *W. H. Brinker*, for relator.

Humphries & Bostwick, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The petitioner brought an action to recover the possession of certain premises sold under a judg-

ment obtained in the superior court of King County June 7, 1899, and affirmed by this court January 19, 1900. It is unnecessary to go into a history of the case, but, briefly, certain testimony was admitted, under the allegations of the answer, upon which the court found certain facts which the relator deemed inconsistent with its rights under the judgment, and which it contends, in effect, destroys the legal operation of said judgment. We are not able to determine, from the judgment heretofore rendered and from the record on this application, that the court is interfering with or disregarding the judgment which was affirmed by this court. It is true that a judgment fixes the rights and liabilities of all parties and privies to the judgment, but it seems to be the contention of the defendants that they are not privy to the judgment, and are therefore not bound by it. There was no plea of former adjudication tendered by the plaintiff to the answer or to the testimony objected to, and, if there had been, the question of whether or not the judgment was *res adjudicata* is a proper question to be determined on appeal. In this case the action was brought by the petitioner for the writ, the cause was tried and the case submitted, and, when it was ascertained by the petitioner that the findings of the court were against its interests, it for the first time asked to have the court prohibited from entering a judgment logically flowing from the findings. Conceding that the contention of the petitioner is correct, that the court's findings were not justified, it was simply the commission of error on the part of the court, which can be remedied only on appeal.

There being no necessity shown for the imposition of extraordinary remedies, the writ will be denied.

FULLERTON, C. J., and ANDERS, MOUNT and HADLEY, JJ., concur.

[No. 4690. Decided August 10, 1908.]

WILLIAM WOODHAM, *Appellant*, v. J. ANDERSON *et al.*,
Respondents.

TAX FORECLOSURE — SUMMONS — TIME FOR APPEARANCE.

Under Laws 1897, p. 182, § 96, subd. 3, requiring defendants in tax foreclosure cases to appear within sixty days after service of summons, exclusive of the day of service, and under Bal. Code, § 4878 (which, by Laws 1897, p. 182, § 97, is made applicable in tax cases), providing for the publication of summons in a newspaper once a week for six consecutive weeks, and that the service should not be complete until the expiration of the time prescribed for publication, a defendant in a tax foreclosure suit under the revenue law of 1897 would have sixty days for appearance after the completion of the publication of summons (Mount, J., and Fullerton, C. J., dissent).

SAME — AMENDMENT OF STATUTE — EFFECT ON PENDING CASES.

Where, pending the completion of service by publication, the law governing it is changed by amendment so as to alter the procedure, and no provision is enacted in the new law making it apply to pending cases or expressly repealing the old law, the question of the sufficiency of the summons to confer jurisdiction would be determined by the law in force at the time of its issuance.

GENERAL APPEARANCE AFTER JUDGMENT — EFFECT.

Where a judgment was void by reason of defective process, it would not be validated by the fact that the defendants subsequently made a general appearance in the action for the purpose of moving its vacation.

TRIAL — DELAY IN FILING PLEADINGS — DISCRETION OF COURT.

The sufficiency of defendant's excuse for delay in filing answer to a complaint after the setting aside of the original judgment therein is a matter resting largely in the discretion of the trial court for determination.

Appeal from Superior Court, Lewis County.—Hon.
 ALONZO E. RICE, Judge. Affirmed.

Forney & Ponder, for appellant:

Upon the substitution of a new remedy for a prior one, all proceedings are governed by the new remedy. Suitors

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are governed by the new act, even as to causes of action which accrued prior to its enactment and also as to pending actions. *Judkins v. Taffe*, 27 Pac. 221; *Bensley v. Ellis*, 39 Cal. 309; *Lee v. Buckheit*, 49 Wis. 54; *Rosenthal v. Wehe*, 58 Wis. 621.

Respondents chose to make a general appearance for many purposes, and asked affirmative relief, so that, even if the court had no prior jurisdiction over the respondents, they conferred it upon the court by their general appearance. *Mayer v. Mayer*, 39 Pac. 1002; *Coad v. Coad*, 41 Wis. 23; *Shafer v. Hockheimer*, 36 Ohio St. 215; *Dreyfus v. Moline, etc., Co.*, 61 N. W. 599; *Burdette v. Corgan*, 26 Kan. 104; *Roberts v. White*, 73 N. Y. 375; *District Township v. District Township*, 54 Iowa, 115 (6 N. W. 163); *Knox v. Somers*, 3 Cranch, 498 (2 L. ed. 510); *Kaw Valley Life Assn. v. Lemke*, 19 Pac. 387; *Grantier v. Rosecrance*, 27 Wis. 488; *Leake v. Gallogly*, 34 Neb. 857.

Brady & Gay, for respondents:

The act of 1901 in reference to publication of summons in tax cases contains no repealing clause as to the act of 1897 on the same subject, and hence would have no application to actions pending at the time it went into effect. *Twenty Per Cent. Cases*, 20 Wall. 187 (22 L. ed. 339); *Newsom v. Greenwood*, 4 Ore. 120.

The opinion of the court was delivered by

HADLEY, J.—The plaintiff in this action as the holder of a delinquency tax certificate, brought this suit to foreclose the same. Publication summons was issued, and was first published February 8, 1901. The summons commanded the defendants to appear within sixty days

from the date of the first publication. Judgment was entered on the 10th day of April, 1901. On December 16, 1901, the defendants filed a motion and petition for the vacation of the judgment, alleging among other things that they had never been legally notified to appear in the cause. At the hearing of the motion the court found that the summons was not in accordance with law, and, having declared the judgment to be void, entered an order vacating it. The defendants were given twenty days within which to plead to the complaint. The twenty days expired March 30, 1902, and on April 3 following the plaintiff moved for a default for the failure to plead. At the hearing of the latter motion the defendants submitted an affidavit in excuse, and the court, deeming the same to be sufficient, denied the motion. The defendants thereupon answered the complaint, alleging that they did not desire to contest the validity of the tax, and tendered in court the full amount thereof, together with penalties, interest, and costs of suit then accrued. They also alleged that the attempted sale of the land under the judgment formerly entered was a cloud upon the title, and asked that the same be declared null and void. The cause was tried by the court, and a decree was entered to the effect that the plaintiff should take nothing by his suit, other than the amount tendered in court by the defendants, and that all of the previous sale proceedings were null and void. The plaintiff has appealed from that judgment.

It is assigned that the court erred in making the order which vacated the original judgment. It will be observed from the statement hereinbefore made that the first publication of the summons was made April 8, 1901. Under the law as it then existed, the summons in a tax case required the defendants to appear within sixty days after

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service of the summons, exclusive of the day of service. Laws of 1897, p. 182, § 96, subd. 3. There was no specific provision in the revenue law for serving a defendant by publication summons. Section 97 of the above act, however, provided that "summons shall be served in the same manner as summons in a civil action is served in the superior court." The above provision undoubtedly authorized a service by publication in the same manner as in other civil actions. The general statute upon that subject is found in § 4878, Bal. Code. The statute provides for publication of the summons in a newspaper once a week for six consecutive weeks, and that the service shall not be deemed complete until the expiration of the time prescribed for publication. Therefore a defendant cannot be said to be *served* with publication summons until the full time of the six weeks' publication has expired; and, inasmuch as the revenue law of 1897, *supra*, provided that a defendant in a tax foreclosure proceeding should not be required to appear until sixty days after the *service* of the summons, it follows, that under that law, when he was served by publication he was not required to appear until sixty days after the period prescribed for publication had ended, for at the expiration of that period only was he actually served. The summons in the case at bar was issued and published when the above rule was in force as to tax cases, but it required an appearance within sixty days from the date of the first publication. There was no authority in law for such a summons in a tax foreclosure case at that time. We recently held, in *Thompson v. Robbins*, decided July 2, 1903, *ante*, p. 149 (72 Pac. 1043) and in *Smith v. White*, decided August 1, 1903, *ante*, p. 414 (73 Pac. 480) that a tax foreclosure summons which does not conform to existing law in the impor-

tant feature of fixing the time within which a defendant shall appear is so fatally defective that it confers no jurisdiction to enter a judgment, and that a judgment entered thereon is void. The same must be held as to the first judgment entered in this case, unless for further reasons urged by appellant it should be held otherwise. The further reasons urged we shall hereinafter consider.

Pending the publication of the summons in this case, and after it had actually been published six consecutive times in as many weeks, an act of the legislature took effect changing the above rule as to service of a publication summons in a tax foreclosure. When the act took effect there remained but two days until the full six weeks' period following the first publication expired, and when the service was complete. The new act will be found in the Session Laws of 1901, chap. 178, page 383. The act is an amendment to certain portions of the revenue law, and specifically provides for publication summons in tax foreclosure cases. Section 1, subd. 2, provides that in the case of service by publication the defendant shall be required to appear within sixty days from the date of the first publication of the summons, exclusive of the day of said first publication. It will thus be seen that the summons published in this case actually conformed to the requirements of the new law, and appellant insists that the new law controlled, and that he was entitled to his judgment at any time after the expiration of sixty days from the first publication of the summons. The act contains no clause expressly repealing the former provisions, but was simply amendatory, and went into effect immediately by virtue of an emergency clause. Was it, therefore, retroactive in its operation, so as to affect the service of process theretofore initiated? It will be observed that the

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change effected by the new statute is one of procedure only. In *Rogers v. Trumbull*, decided by this court July 10, *ante*, p. 211 (73 Pac. 381) we held that "where a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings." In that opinion we quoted and adopted the rule as stated in Sutherland on Statutory Construction, § 482, as follows:

"Where a new statute deals with procedure only, *prima facie* it applies to all actions—those which have accrued or are pending, and future actions. If before final decision a new law as to procedure is enacted and goes into effect, it must from that time govern and regulate the proceedings. But the steps already taken, the status of the case as to the court in which it was commenced, the pleadings put in, and all things done under the late law, will stand, unless an intention to the contrary is plainly manifested; and pending cases are only affected by general words as to the future proceedings from the point reached when the new law intervened."

There is no manifest intention expressed in this statute to make the new procedure affect the status of pending cases. Under the above rule, therefore, "all things done under the late law will stand." It follows that the summons in this case, issued and published as it was under the late law, must be governed by that law. If under the former law the summons did not confer jurisdiction to enter the judgment, the later law did not vitalize it so as to give it jurisdictional force. The judgment was therefore void, and the court did not *err* in vacating it.

Appellant urges that respondents waived the defect in the summons by making a general appearance when they moved to vacate the judgment. It is true, their motion and petition did not state, in words, that it was intended as a special appearance, as provided by § 4886, Bal. Code. Their appearance, therefore, brought them within the jur-

isdiction of the court for all future proceedings in the cause, and did not limit the jurisdiction to the one matter presented by the petition, as would have been the case if their appearance had been special. But what had theretofore been done was done without jurisdiction. The judgment previously entered was void. Their general appearance at that time did not validate the void judgment, but simply brought them into court, without the necessity of new process, to be dealt with thereafter as the law of the case required.

It is further insisted that the court erred in denying appellant's motion for default for want of answer after the original judgment was set aside. As hereinbefore stated, an affidavit was presented which was intended to excuse the delay. The matter was largely a discretionary one with the court, and, from the record, we shall not undertake to say that the discretion was abused. When the answer was filed, accompanied with the tender, the case stood ready for disposition in accordance with the revenue law. The process authorized by statute requires a defendant to appear "and defend the action or pay the amount due." By the tender of the full amount, with accrued costs, respondents complied with the law, and were entitled to judgment.

The judgment is affirmed.

ANDERS and DUNBAR, JJ., concur.

MOUNT, J. (dissenting). I dissent from that part of the foregoing opinion which declares that, as to tax cases, the defendant was not required to appear until sixty days after the period prescribed for publication had ended. As I understand the opinion, it does not purport to hold that in cases other than tax cases the defendant has sixty days

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after the period for publication is ended in which to appear in the cause, but that by reason of subd. 3 of § 96 of the act of 1897, which required "a direction to the owner summoning him to appear within sixty days after service of summons exclusive of the day of service," it is held, under this special statute (referring to a special proceeding), that the defendant is not served until the full time of six weeks publication has expired. If § 97 of the act of 1897 authorized service of summons in tax foreclosure cases by publication, it also authorized such service to be made in a tax case, as in any other case under the general publication statute. That statute, which is § 4878, Bal. Code, provides that, "the summons shall contain the date of the first publication and shall require the defendant or defendants, upon whom service by publication is desired, to appear and answer the complaint within sixty days from the date of the first publication of summons." It seems clear to me that this statute required the defendant to appear within sixty days from the date of the first publication of the summons, and that the first publication is the date from which the time begins to run, and is intended to be "*the day of service*." The phrase "and the service of the summons shall be deemed complete at the expiration of the time prescribed for publication" (which is six weeks) is construed by the majority to mean that *the day of service* begins on the date of the first publication, and extends for a period of six weeks. The statute is, no doubt, susceptible of such construction; but when the whole section is read together, it seems more reasonable to hold that the legislature intended that, when service is made by publication, the day of the first publication is "*the day of service*," and the provision that the service shall be deemed complete at the expiration of six

weeks does not mean that the day of service is a day six weeks long. The legislature of 1901 (Laws 1901, p. 384), realizing that such a construction might be placed upon the act of 1897, amended § 96 so that it is now clear that the sixty days begin to run from the date of the first publication. I think it should be so held in this case.

FULLERTON, C. J., concurs in dissenting opinion.

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[No. 4763. Decided August 10, 1903.]

THE STATE OF WASHINGTON *on the Relation of John Cawley et al. v. TOWN OF BREMERTON et al.*

SUPERSEDEAS — ISSUANCE BY SUPREME COURT IN AID OF APPELLATE JURISDICTION — FUTILITY OF APPEAL — EFFECT.

A writ of supersedeas will not issue from the supreme court to stay a judgment of the superior court pending appeal, where it appears that the controversy will have ceased at the time of the hearing of the appeal in regular course, since it is the intent of art. 4, § 4, of the constitution that writs in aid of the court's appellate jurisdiction shall be issued only in cases when necessary and proper to the complete exercise of such jurisdiction and when the appeal would afford inadequate remedy.

Original Application for Supersedeas.

George C. Israel and R. H. Lindsay, for petitioners.

Greene & Griffiths, for respondents.

The opinion of the court was delivered by

MOUNT, J.—Prior to June 6, 1903, the town of Bremerton, a municipal corporation of the fourth class, had issued to relators a license to retail spirituous and malt liquors within the limits of said town at a place therein designated. On that day the relators were engaged in con-

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ducting a saloon under their license for the retail of liquors, when the mayor issued and caused to be served upon them a notice to appear at a special meeting of the common council of said town, to be held three hours after the notice was served, and show cause why their license should not be revoked. After the service of this notice, and on the same day, the mayor and common council met in special session and charged relators with violating the terms of the ordinance under which the license had been issued, and, without affording relators an opportunity to be heard, and without any proof of the charges made, the mayor and council passed an ordinance revoking and cancelling the license. Before the mayor and council could carry this ordinance into effect, or cancel or annul the license, relators, upon application to the superior court for Kitsap county, obtained from said court a writ of certiorari commanding the mayor and council to certify their proceedings to the said court for review, and to appear before said court on July 24, 1903, and show cause why the ordinance should not be set aside and annulled; and an order was also issued commanding the respondents in the meantime to desist from further proceedings until the further order of the court. Relators thereupon continued their business until the 25th day of July, 1903, at which time the said writ of review came on for hearing before the court upon the return of relators to the writ and upon a motion of respondents to quash the writ upon the ground that the court had no jurisdiction of the subject matter of the action, for the reason that the acts complained of were legislative, and not judicial, in their character. The lower court so held, and by a final order quashed the writ and dismissed the proceedings. Relators thereupon appealed to this court from the said order. The

license of relators will expire by its terms on October 1, 1903. The appeal taken from the final order of the court quashing the writ cannot be heard in this court before that time. For these reasons, and the further one that the lower court is not authorized to supersede the judgment in cases of this kind, relators have applied to this court for an order superseding the judgment of the lower court, and also superseding the operation of the ordinance, so that relators may continue to conduct their saloon under their license until the appeal may be heard in this court.

In the case of *State ex rel. Barnard v. Board of Education*, 19 Wash. 8 (52 Pac. 317, 40 L. R. A. 317, 67 Am. St. Rep. 706), it was said that "this court, in the exercise of its discretion, by virtue of its inherent powers as an appellate tribunal, can issue an order of supersedeas to preserve the *status quo* of the parties, pending the determination of the appeal upon its merits." That was a case where the relator was accused of malfeasance in office, and the charges were being tried by a board one member of which was disqualified by reason of enmity and declarations which he had made. The writ was sued out to prevent this disqualified member from sitting as a member of the board. The lower court quashed the writ, and an appeal was taken therefrom, and this court issued a supersedeas "for the purpose of making the appeal effective and to insure the complete exercise of this court over that appeal."

The case of *State ex rel. Bringgold v. Burns*, 21 Wash. 227 (57 Pac. 804), was a case where relator was being tried before the board of police upon an accusation of inefficiency and misbehavior. While the trial was in progress, the superior court of Spokane county issued a temporary writ prohibiting the board of police from pro-

ceeding further with the trial. Upon a hearing the superior court quashed the writ, and the relator appealed to this court. The appellant thereupon applied to this court for a writ to supersede the judgment and continue the writ of prohibition against the board of police, staying further action upon the charges before that board pending the appeal. Upon that application this court, after distinguishing the case of *State ex rel. Barnard v. Board of Education*, said:

“The court will not grant this writ as of course. Before it will do so, it will look far enough into the merits of the application to ascertain whether some substantial right of the complaining party has been invaded, which this court will probably remedy by the determination of the appeal.”

The court then determined the merits by holding that the board of police had jurisdiction to try the relator upon the charges and denied the writ. Both of these cases are similar to the case at bar. In one the supersedeas was granted; in the other it was denied. They both lay down the rule that it is within the discretion of this court to issue the writ. But in this case we think the discretion ought not to be exercised. The evident intention of § 4, art. 4, of the constitution, was that writs of this character should be issued only when necessary and proper to the complete exercise of the appellate and revisory jurisdiction of this court where the appeal is an adequate remedy. It was certainly not intended that the writ should issue when it would be oppressive upon either party, or where its issuance is a virtual determination of the questions raised on the appeal. It is true the relators have appealed to this court; the order appealed from is one from which an appeal is authorized. But these facts are not sufficient to warrant this court, not

only in superseding the judgment of the lower court, but also in reaching beyond that and annulling the ordinance completely so far as it affects the relators. This appeal can never be heard upon its merits. Relators' license will expire by its terms on October 1, 1903. The next regular session of this court will not begin until after that time. When the case is called for hearing on the regular docket the controversy will have ceased, and under the uniform holdings of this court will be dismissed. If a supersedeas is issued, the relators will be permitted to conduct their business, in violation of the ordinance and of the judgment of the lower court, until the expiration of the term of their license, and thereupon they will have no further interest in the appeal. If the supersedeas is not issued they cannot conduct their business between this time and October 1, 1903, when their right to conduct it will expire. In either event, after the expiration of the license upon which all their rights are based, there can be no live question for our consideration. The appeal, therefore, is inadequate, even if relators have the right to take it. If the appeal were an adequate remedy, and a supersedeas as prayed would insure a hearing upon the merits, we should feel inclined to grant it; but a supersedeas which permits an ordinance or a statute to be avoided, and which gives an appellant all the advantages of a reversal without a hearing upon the case, is dangerous, and should not be granted when there is any other remedy.

For these reasons the application is denied.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4642. Decided August 11, 1903.]

PAUL HOPKINS & SON, *Respondents*, v. SEATTLE SCANDINAVIAN FISH COMPANY, *Appellant*.

SALES — MANUFACTURE OF MACHINERY — COMPLETION WITHIN REASONABLE TIME.

In an action to recover the price of a boiler constructed upon defendant's order, the latter is not entitled, by way of counterclaim, to damages for delay in filling the order, when the contract provided that the boiler was "to be completed within six weeks after the arrival of the iron in Seattle," and the evidence shows that the plaintiffs had promptly placed their order for the necessary materials, but were delayed in their work by inability to procure a certain thickness of steel plate, because of its not being in the market, and that, after getting the consent of the government inspectors to the substitution of thinner plates, they at once procured same and promptly completed the boiler within six weeks thereafter.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Metcalfe & Jurey and *Charles K. Jenner*, for appellant:

No time is fixed by the written agreement within which the plaintiff should procure the "arrival of the iron at Seattle." This was a duty resting solely and alone upon the plaintiffs, and the starting point of the six weeks' limitation provided in the agreement for the completion of the boiler. Then the law implies an agreement on the part of the plaintiffs to procure the arrival of the iron in Seattle within a reasonable time. *Hamilton v. Scully*, 8 N. E. 767; *Truesdale Mfg. Co. v. Hoyle*, 39 Ill. App. 532; *McCartney v. Glassford*, 1 Wash. 579; *Griffin v. Ogle-tree*, 21 South. 488; *Curtiss v. Waterloo*, 38 Iowa, 266; *Williams v. Hart*, 116 Mass. 513; *Sawyer v. Hammatt*, 15

from the date of the first publication. Judgment was entered on the 10th day of April, 1901. On December 16, 1901, the defendants filed a motion and petition for the vacation of the judgment, alleging among other things that they had never been legally notified to appear in the cause. At the hearing of the motion the court found that the summons was not in accordance with law, and, having declared the judgment to be void, entered an order vacating it. The defendants were given twenty days within which to plead to the complaint. The twenty days expired March 30, 1902, and on April 3 following the plaintiff moved for a default for the failure to plead. At the hearing of the latter motion the defendants submitted an affidavit in excuse, and the court, deeming the same to be sufficient, denied the motion. The defendants thereupon answered the complaint, alleging that they did not desire to contest the validity of the tax, and tendered in court the full amount thereof, together with penalties, interest, and costs of suit then accrued. They also alleged that the attempted sale of the land under the judgment formerly entered was a cloud upon the title, and asked that the same be declared null and void. The cause was tried by the court, and a decree was entered to the effect that the plaintiff should take nothing by his suit, other than the amount tendered in court by the defendants, and that all of the previous sale proceedings were null and void. The plaintiff has appealed from that judgment.

It is assigned that the court erred in making the order which vacated the original judgment. It will be observed from the statement hereinbefore made that the first publication of the summons was made April 8, 1901. Under the law as it then existed, the summons in a tax case required the defendants to appear within sixty days after

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service of the summons, exclusive of the day of service. Laws of 1897, p. 182, § 96, subd. 3. There was no specific provision in the revenue law for serving a defendant by publication summons. Section 97 of the above act, however, provided that "summons shall be served in the same manner as summons in a civil action is served in the superior court." The above provision undoubtedly authorized a service by publication in the same manner as in other civil actions. The general statute upon that subject is found in § 4878, Bal. Code. The statute provides for publication of the summons in a newspaper once a week for six consecutive weeks, and that the service shall not be deemed complete until the expiration of the time prescribed for publication. Therefore a defendant cannot be said to be *served* with publication summons until the full time of the six weeks' publication has expired; and, inasmuch as the revenue law of 1897, *supra*, provided that a defendant in a tax foreclosure proceeding should not be required to appear until sixty days after the *service* of the summons, it follows, that under that law, when he was served by publication he was not required to appear until sixty days after the period prescribed for publication had ended, for at the expiration of that period only was he actually served. The summons in the case at bar was issued and published when the above rule was in force as to tax cases, but it required an appearance within sixty days from the date of the first publication. There was no authority in law for such a summons in a tax foreclosure case at that time. We recently held, in *Thompson v. Robbins*, decided July 2, 1903, *ante*, p. 149 (72 Pac. 1043) and in *Smith v. White*, decided August 1, 1903, *ante*, p. 414 (73 Pac. 480) that a tax foreclosure summons which does not conform to existing law in the impor-

in the market, and the respondents were unable to procure it from their San Francisco correspondent or elsewhere. About the middle of June they applied to a government inspector of boilers at Seattle, by whom the boiler would have to be finally approved, for leave to construct this part of the boiler out of three-eighths-inch steel. This permission was granted them, provided they would put in certain reinforcements, not called for in the original specifications. Steel of this thickness was thereupon ordered, and the boiler completed within six weeks after its arrival in Seattle. The boiler was subsequently approved by the inspector, and accepted by the appellant. While there is much in the record on the question of the amount of diligence exercised by the respondents in their efforts to procure the materials, it nowhere appears that marine steel of the dimensions called for in the contract could have been procured at that time by them; nor does it appear that it was commonly difficult to procure, or that the exercise of ordinary business prudence would have informed the respondents at an earlier time than they abandoned the search for it that it could not then be procured. Indeed, in so far as there is anything in the record at all on these questions, it points to a contrary conclusion. It was shown that this class of steel was usually kept in stock by certain of the Seattle wholesale dealers, and that one such, when applied to for it, stated that they had none at that time, but expected it in their next shipment, which was then nearly due, inferentially indicating, at least, that it was not commonly understood that such steel was difficult to procure, or that it was generally known at that time among business men that it could not then be procured. But, without further pursuing the evidence, we think it would, on the showing made, be going too far

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to hold that there was a breach of the condition of the contract relating to the time the boiler was to be completed. This part of the contract is, as we say, not very definite. While it is doubtless true that the respondents were bound to use reasonable diligence in procuring the materials necessary to make a complete marine boiler, yet the phrase itself is so far incapable of exact definition that it has only a relative signification, and before a person should be held in damages for an alleged failure to exercise reasonable diligence, it should be so far clear from the evidence that there had been such want of diligence that reasonable minds will not reasonably differ as to the fact. Here, in our opinion, there is not such a degree of proof, and we think the trial court did not err in so holding.

This conclusion renders it unnecessary to discuss other questions suggested in the briefs. The judgment is affirmed.

HADLEY, ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4647. Decided August 11, 1903.]

GEORGE CARRATT, *Appellant*, v. HENRY B. CARRATT *et ux.*, *Respondents*.

HUSBAND AND WIFE — SEPARATE PROPERTY — FORFEITURE OF LAND GRANT — PURCHASE OF PUBLIC LANDS BY SURVIVING SPOUSE.

The purchase by a surviving husband of lands which had been forfeited to the government by act of congress as part of the unearned grant to a railway company, under the preference right given thereby to one in possession, would give him a separate estate therein, even though the lands had been taken possession of by himself and wife, during the existence of the community, under conveyance from the railway company.

Appeal from Superior Court, Klickitat County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

H. Dustin and Brooks & Snover, for appellant.

W. B. Presby and Huntington & Wilson, for respondents.

The opinion of the court was delivered by

HADLEY, J.—Henry B. Carratt and Sarah Carratt had been, for many years prior to November 28, 1889, husband and wife. On said date Sarah Carratt died. On March 29, 1887, and during the existence of the community arising from the said marriage relation, one Wise for a consideration of \$2,500 executed a warranty deed to said Henry B. Carratt, purporting to convey certain described lands in Klickitat county, Washington. Said Carratt and wife at once entered into the possession of said lands and continued to occupy the same until the time of the wife's death. Henry B. Carratt remained in possession thereof after his wife's death. The said Wise, grantor in said deed, claimed title to the land by virtue of a conveyance thereof made by the Northern Pacific Railroad Company, bearing date March 24, 1887. The lands described in the deeds above mentioned were included in the land grant made to said railroad company by act of Congress. On September 29, 1890, Congress passed what is commonly called the "Forfeiture Act," whereby it declared "that there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any state or to any corporation to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are

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declared to be a part of the public domain." U. S. Comp. St., 1901, p. 1598 (26 St. at Large, 496). By the terms of said act the lands sought to be conveyed by the said deeds became a part of the public domain. Under the provisions of § 3 of the act a person then in possession of lands thus restored to the United States, such possession being under deed or contract from the corporation to which the grant was originally made, was entitled to purchase the land from the United States in quantities not exceeding 320 acres to any one person within two years from the passage of the law. As such person in possession of the lands above referred to Henry B. Carratt applied to purchase the same, and, having complied with the requirements of the law, a patent was issued to him bearing date May 31, 1892. Said patent conveyed to him all the lands described in the above mentioned deeds except twenty acres, and the latter was by patent of date August 27, 1892, conveyed to one Hinshaw, the same having been previously conveyed by deed from Hinshaw and wife to Henry B. Carratt October 28, 1891. Henry B. Carratt died February 5, 1900, and by will he devised all of said lands to Rachel Carratt. He remained in possession of the land until the time of his death, and since that time Rachel Carratt has been in possession thereof. George Carratt, the plaintiff and appellant in this action, is a son of Henry B. Carratt and Sarah Carratt, and is the only heir of Sarah Carratt. He brought this suit, claiming that the lands acquired as above stated were the community property of his father and mother, and that he, as the heir of his mother, is entitled to one-half of the lands. He seeks a partition of the lands. Rachel Carratt, the devisee of the lands under the will, is a granddaughter of Henry B. Carratt, and her co-defendant, Harry B. Carratt, is a

grandson of said Henry B. Carratt. Said Harry B. Carratt was a beneficiary under the will, but not a devisee of any interest in the land. The court, after a trial, concluded that the property in question was not community property, but was the separate property of Henry B. Carratt at the time of his death, and that the entire title thereto vested in Rachel Carratt by virtue of said last will. Judgment was entered that the plaintiff shall take nothing by his action, and that defendants shall recover costs. Plaintiff has appealed.

The respondent Rachel Carratt urges, first, that the lands were not community property, and further, that, if they were, appellant is barred by adverse possession, and is also estopped by a release of all his interest in his mother's estate, executed by him to his father Henry B. Carratt. We think, under the facts hereinbefore stated, that the lands were not the property of the community. With the death of the wife in November, 1889, the community ceased to exist. Nearly one year after that time the act of Congress mentioned above declared a forfeiture of the lands, and the title became absolute in the government. The act extended to the person in possession the privilege of purchasing. The privilege was granted to the person in actual possession at the time the law was passed. That person was Henry B. Carratt. The community was not in possession after the death of the wife, since it had ceased to be. The community, therefore, could not have been in possession when the law was passed, for the reason that no such an entity then existed. Actual possession by the purchaser was made a necessary element of the right to purchase granted by the law. The title conveyed by the government must therefore have vested in the person so in possession, proof of which was required before the convey-

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ance was made. The property was acquired by Henry B. Carratt after the dissolution of the community by virtue of a right extended to him under a statute that did not exist in the lifetime of the community. He happened to be the surviving spouse, it is true. The right was not extended to him as such, however, but as the person in possession. We think it must be held that the lands so conveyed to him became the separate property of Henry B. Carratt. The same is true of the tract patented to Hinshaw. That was acquired by Hinshaw long after the community was dead, and was also conveyed by him to Henry B. Carratt nearly two years after the community ceased to exist. None of the lands were afterwards conveyed by Henry B. Carratt, and he was therefore authorized to dispose of them by his last will. By the terms of the will the respondent Rachel Carratt became the holder of the entire title, and the appellant is not entitled to any share in the lands.

The above point essentially disposes of the case. The trial court also found facts from which it concluded that appellant was barred in any event by adverse possession, and also that he was estopped by a quitclaim and release unto his father of all interest in his mother's estate. It is not necessary that we shall discuss these points, further than to say that from our examination of the evidence we should not be disposed to disturb the findings and conclusions in those particulars, even though it were necessary to discuss them for the determination of the case.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS and MOUNT, JJ., concur.

[No. 4678. Decided August 11, 1908.]

E. G. SELBY, *Respondent*, v. VANCOUVER WATER WORKS
COMPANY, *Appellant*.

APPEAL — OBJECTION NOT RAISED BELOW — SUFFICIENCY OF COMPLAINT
— PRESUMPTION AS TO AMENDMENT.

The objection that the complaint does not allege defendant's negligence as the proximate cause of plaintiff's injury cannot be raised for the first time on appeal, when the evidence sufficiently connects the one as the proximate cause of the other, thereby warranting the court in deeming the complaint amended to correspond therewith.

NEGLIGENCE — OBSTRUCTION IN HIGHWAY — FRIGHTENING HORSES —
QUESTIONS FOR JURY.

Whether defendant was negligent in piling old planks on a highway close to the traveled part, without any authority therefor and without any showing of necessity except that the planks would have slid down and injured the abutting owner's fence if they had been placed off the traveled way, on the slope of the embankment, and whether the obstruction was of such a character as to frighten horses, were questions for the jury in an action for injuries caused by plaintiff's horse shying at such obstruction.

SAME — EXCESSIVE DAMAGES.

A verdict for \$1,500 for injury to the arm of a common laborer cannot be said to be excessive, where it appears that he was entirely incapacitated from using it for about three months; that he would probably never be able to lift as much with it or use it as dexterously as before; that by reason of the fracture being in the joint of the elbow his suffering had been more acute than in the case of ordinary bone fractures; and that he had spent the sum of \$100 for surgical treatment.

SAME — INSTRUCTIONS — REASONABLE NECESSITY FOR OBSTRUCTIONS.

In an action for damages because of injuries occasioned by the fright of a horse at debris placed along the side of a public highway by defendant, a charge to the jury that if it was not reasonably necessary for defendant in making improvements to use the highway for piling and burning debris, then defendant had no right to use it for that purpose, and plaintiff could recover

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damages for injuries occasioned thereby, was a proper statement of the law.

SAME — HARMLESS ERROR.

An appellant cannot complain of an instruction as being adapted to a question not in issue under the pleadings and proof, when the instruction, if erroneous at all, would be prejudicial to the respondent and not to the appellant.

Appeal from Superior Court, Clarke County.—Hon. ABRAHAM L. MILLER, Judge. Affirmed.

W. W. McCredie (*J. W. Hopkins*, of counsel), for appellant:

It is not every obstruction of a street or highway that is unlawful. The right of the public to the free and unobstructed use of a highway is not a complete and unqualified right. It is subject to certain limitations and restrictions. Among such limitations and restrictions is the right of an abutting owner in cases of reasonable necessity to make a reasonable use of a highway or a portion thereof for the temporary storing of building materials, the loading and unloading of goods, etc. *Dillon, Municipal Corporations* (4th ed.), § 730; *Loberg v. Amherst*, 41 Am. St. Rep. 69; *Raymond v. Kiseberg*, 19 L. R. A. 643; *Cowan v. Muskegon Ry. Co.*, 48 N. W. 166; *Fitch v. New York, etc., R. Co.*, 59 Conn. 414 (10 L. R. A. 188); *Nichols v. Athens*, 66 Me. 402; *Farrell v. Oldtown*, 69 Me. 72; *Judd v. Fargo*, 107 Mass. 264; *Kingsbury v. Dedham*, 13 Allen, 186; *Clark v. Fry*, 8 Ohio St. 358; *Davis v. Winslow*, 51 Me. 264.

C. D. Bowles, for respondent:

The placing of objects calculated to frighten horses in a highway is negligence, and when injury occurs action will lie. *Fooshay v. Town of Glen Haven*, 25 Wis. 288; *Jones*

v. Housatonic R. R. Co., 107 Mass. 261; *Ayer v. Norwich*, 12 Am. Rep. 396; *House v. Metcalf*, 27 Conn. 631; *Judd v. Fargo*, 107 Mass. 264; *Macomber v. Nichols*, 22 Am. Rep. 522.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action to recover damages for personal injuries occasioned as the result of the negligence of defendant. The defendant was the owner of a flume which ran along a county highway, and, in reconstructing its ditch or flume, removed the old planking, and placed it in heaps along the side of the road, until it could be disposed of. At the point where the accident happened, the road skirted the side of a hill, having the bluff on one side and a drop of about four feet on the other, the road at this place being about fifteen feet in width. On the side of the road next to the bluff the defendant had placed a pile of planks, some two or more feet in height, on the edge of the highway, but not sufficiently close to the traveled way to interfere with the use of the road. It was the intention of the appellant to burn the planking as soon as it became dry, but this particular pile, while it had remained on the road several days, was not so disposed of until the day following the accident. While plaintiff, unaware of the obstruction on the side of the road, was driving by there with a companion in a buggy, shortly after nine o'clock in the evening, his horse suddenly shied at the plank heap, and plunged over the side of the embankment, overturning the buggy, and throwing the plaintiff out in such a manner as to break his right arm at the elbow. The horse was a gentle one, not accustomed to shying at familiar objects; the night was dark enough to prevent objects being seen distinctly; and the plaintiff was driving slowly

and carefully, with a tight rein, and in all respects, according to the evidence, exercising due care. A verdict of \$1,500 was rendered in favor of plaintiff, and from the judgment thereon the defendant appeals.

The first error assigned is that the complaint does not allege sufficient facts to constitute a cause of action, in that it does not connect the negligence of the defendant with plaintiff's injury in such a way as to charge the one as the proximate cause of the other. But, inasmuch as this objection is raised for the first time on appeal, and was not urged by way of demurrer or objection to the introduction of evidence, the complaint will be deemed amended to correspond with the evidence, wherein it clearly appears that the horse shied at the pile of planks placed in the road by defendant. *Green v. Tidball*, 26 Wash. 338 (67 Pac. 84, 55 L. R. A. 879).

The assignments to the effect that the court erred in refusing a nonsuit and in denying a directed verdict in defendant's favor involve practically but one question—whether the court should have said as a matter of law that there was no evidence of actionable negligence for the jury to pass upon. The evidence was undisputed that the defendant had placed an obstruction close to the traveled part of the highway, without any showing of authority or of necessity except that the planking would slide down and injure the abutting owner's fence if it had been placed off the traveled way on the slope of the embankment. Whether the defendant was negligent in so doing, and whether the obstruction was of such a character as to frighten horses, were clearly questions for the jury. Nor was there anything in the evidence requiring the court to declare the plaintiff guilty of contributory negligence as a matter of law. It is true, the evidence was somewhat un-

certain as to just how plaintiff's arm received its injury, the plaintiff himself not being conscious, in the moment of excitement, as to just how it occurred; but there was sufficient evidence to require the determination of the jury upon the question of its being the natural result of the defendant's negligence under the circumstances.

An objection is made that the verdict was so excessive as to indicate passion and prejudice. The jury awarded \$1,500 damages, but we are not disposed to disturb the verdict, although the evidence shows that the respondent's occupation was that of common laborer, that he was entirely incapacitated for only a period of three months, and that there was no likelihood of his ever becoming permanently so; as the evidence further shows that by reason of the fracture having been in the joint of the elbow his suffering was much more acute than is the case from ordinary bone fractures; that he was twenty-eight years of age, and probably would never be able to lift as much with the injured arm, or use it as dexterously, as before; and that he had been compelled to expend the sum of \$100 for its surgical treatment.

The court gave the following charge to the jury, to which exception was taken by the defendant:

"You are instructed that the defendant company had no right to place obstructions upon the public highway in the nature of refuse material, unless it was reasonably necessary to temporarily use the highway while making improvements. If in this case it was reasonably necessary for the company to pile the debris mentioned within the right of way of the public highway in making its improvements,—it was its duty to use due and proper care in doing so, so as to guard against injury, and unless such care was used and injury resulted therefrom and plaintiff herein was not guilty of contributory negligence the company is responsible for any injury directly resulting there-

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from. If it was not-reasonably necessary for the defendant in making its improvements to use the highway for piling and burning the debris from the old flume, then the company had no right to use it for that purpose, and if it did so use it for that purpose and plaintiff was injured therefrom while traveling upon the highway in the usual manner and was not guilty of contributory negligence, then he is entitled to recover."

There was no error in giving the above instruction. It was a clear exposition of the law, in harmony with the weight of authority. The doctrine is enunciated in Elliott on Roads & Streets (2d ed.), § 616, where he speaks of the liability of a municipal corporation, as follows:

"Where a horse of ordinary gentleness becomes frightened at objects naturally calculated to frighten horses, which the corporation has negligently placed, or permitted to be placed and remain in the highway, and injury results, without contributory negligence, the corporation will, as a rule, be liable therefor. This liability extends to objects on the margin of the highway and within its limits, although they may not be within the traveled path. The object must be of such a character, however, that it is naturally calculated to frighten horses. . . . Whether the object is, in its nature, calculated to frighten horses of ordinary gentleness is usually, however, a question for the jury to determine from a consideration of its character, situation, the amount of travel on the highway, and other like circumstances."

Also Id., § 649:

"An object at the side of a highway, or in close proximity thereto, of such a character that it is naturally calculated to frighten horses of ordinary gentleness, may constitute a nuisance."

See, also, Cooley, Torts,* p. 617; Jaggard, Torts, p. 765; 15 Am. & Eng. Enc. Law (2d ed.), p. 446.

The appellant's further objection to the instruction is

that it imposes upon the jury the duty of finding a reasonable necessity for the defendant to use the margin of the road for the temporary piling of its refuse plank, while the question of reasonable necessity was not an issue under the pleading or proof. But, conceding that fact, the instruction was not prejudicial to appellant. The respondent might reasonably have complained, as the instruction puts a limitation on the doctrine of liability for placing obstructions on a highway not sustained by all of the authorities; but it was not unfavorable to the appellant's case.

The judgment is affirmed.

HADLEY, ANDERS, MOUNT and DUNBAR, JJ., concur.

[No. 4427. Decided August 14, 1903.]

FLORENCE O'NEILE, *Appellant*, v. JOHN B. TERNES *et al.*,
Respondents.

APPEAL — NOTICE — DESCRIPTION OF JUDGMENT.

When there was but one judgment in a cause, which was actually rendered and announced on the 20th of the month, but not filed until the 21st, a notice of appeal designating the judgment appealed from as one entered on the 20th sufficiently complied with the requirements of Bal. Code, § 6503, as to the necessity of designating "with reasonable certainty from what judgment or orders the appeal is taken."

SAME — STATEMENT OF FACTS — SUFFICIENCY — CERTIFICATE.

The fact that the certificate of the trial judge to a statement of facts bears no date, does not refer to any pages or exhibits or contain any order referring to copies of exhibits would not render it insufficient, when in form and substance it complies with the requirements of Bal. Code, § 5060, by certifying "that the matters and proceedings embodied in this statement are matters and proceedings occurring in this cause and that the same are hereby made a part of the record herein" and "that the same contains

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all the material facts, matters and proceedings heretofore occurring in this cause and not already a part of the record therein."

SAME — INCORPORATION OF DEPOSITIONS AND WRITTEN EVIDENCE.

The failure to attach depositions and other written evidence to the statement of facts as provided by Bal. Code, § 5059, would not warrant the striking of such matters from the statement, where copies had been read and offered in evidence and were incorporated in the statement as a part thereof, under the certificate of the judge that they were matters occurring in the cause and were thereby made a part of the record therein.

SAME — TIME OF SETTLEMENT — PRESUMPTIONS AS TO REGULARITY.

A statement of facts filed after the thirty days allowed by statute, but within the sixty days additional permitted by Bal. Code, § 5062, will not be stricken from the files because no order of the court fixing the time for settling and certifying same is shown in the record, in the absence of any showing of proposed amendments to the statement, since, under *Id.*, § 5058, the statement is, in such cases, deemed agreed to and may be certified by the judge at any time at the instance of either party.

TRIAL — EQUITABLE ACTION — MOTION FOR NONSUIT.

The dismissal of an action of equitable cognizance upon a motion for nonsuit would not constitute error, although technically a misnomer of the proper procedure in such cases, if the evidence of plaintiff showed she was entitled to no relief, and that a dismissal was warranted.

EXECUTORS — RELATIONS TOWARD LEGATEES — FRAUDULENT PURCHASE OF LEGACY.

The executor does not sustain such a trust relation to a legatee under the will as to render fraudulent *per se* the purchase by him from the legatee of the property acquired under the will, and only in case of actual fraud could such a sale be set aside.

CORPORATE OFFICERS — DUTIES TO STOCKHOLDERS — SALE OF STOCKS.

The purchase by an officer of a corporation of corporate stock from a stockholder is not such a transaction as falls within the trust relations of the parties, as the trust relation of officers and directors extends only to the corporate business and property of the company, and not to their private dealings with stockholders.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

Frank H. Graham, for appellant.

Fremont Campbell and *Charles O. Bates*, for respondents.

The opinion of the court was delivered by

ANDERS, J.—This action was brought by Florence O'Neile (appellant) to rescind and set aside a sale of one hundred shares of the capital stock of the Tacoma Carriage & Baggage Transfer Company, a corporation, which were bequeathed to her by John M. Nolan, deceased, and which she sold to Mary Ternes before the same was issued to her, and to have said stock restored and issued to her by said corporation. It appears that at the time this stock was sold by plaintiff the defendant Mary Ternes was the wife of John B. Ternes, and that the defendants John B. Ternes and George B. Kandle were the executors of the last will and testament of the said Stephen M. Nolan, deceased, and that the said John B. Ternes and George B. Kandle and Helen I. Nolan were the administrators of the community estate of said Stephen M. Nolan, deceased, and Helen I. Nolan, his wife. It also appears that at the time of said sale and purchase of said stock the defendant and respondent John B. Ternes was, and still is, an officer of the Tacoma Carriage & Baggage Transfer Company, and the general manager of its business. All of the above named individuals, as well as the said transfer company, were made defendants in the action. After the plaintiff had introduced her evidence and rested, the trial court, on motion of counsel for defendants, dismissed the action at the costs of plaintiff, and from that judgment the plaintiff has appealed.

The respondents move to dismiss the appeal on the alleged ground that it does not appear from the notice of

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appeal that the judgment appealed from is the judgment filed and entered in this cause in the superior court. Our statute provides that:

"The appellant in his notice of appeal shall designate with reasonable certainty from what judgment or orders, whether one or more, the appeal is taken, and if from a part of any judgment or order, from what particular part." Bal. Code, § 6503.

The only objection to this notice is that it designates the judgment appealed from as a judgment entered in the action on the 20th day of March, 1902, whereas the judgment in the record was not filed and entered until the 21st day of March, 1902. The fact is the judgment upon its face shows that it was actually rendered and announced on the 20th day of March. And this court has held that a judgment announced by the court is so far complete as to sustain a notice of appeal although it has not been duly signed and entered. *Hays v. Dennis*, 11 Wash. 360 (39 Pac. 658). Moreover, there was only one judgment rendered and entered in this cause, and that was designated not only with reasonable, but absolute, certainty in appellant's notice of appeal. The motion to dismiss the appeal is denied.

The respondents further move this court to strike the statement of facts from the files in this case and affirm the judgment of the lower court, for the alleged reasons (1) that the same was not filed before the service thereof upon the respondents; (2) that the said statement of facts was filed in the superior court eighty-four days after the judgment was entered in the cause, and that at the time of the filing of said statement no order had been obtained or entered extending the time for filing and serving said statement of facts, or application made for an extension of time to file and serve the same; (3) that there is no proper cer-

tificate of the judge of the lower court attached to said statement of facts; and (4) that no order was ever made or entered fixing a time for the settlement or certifying of said statement. And, in case the motion to strike the whole of the statement is not granted, the respondents further move to strike certain portions thereof, for the reason that the same are parts of the files and records in the cause, and should not be made a part of the statement of facts, and also certain other portions, the same being a purported copy of the deposition of plaintiff, and copies of certain exhibits of plaintiff and defendants, for the reason that the original deposition of plaintiff and said original exhibits are not sent up to this court on this appeal, and are not attached to the statement, or referred to in any way in the certificate of the trial judge, attached to the statement of facts, or made part of said statement of facts in said certificate of the trial judge, and no order was ever made or entered permitting copies thereof to be embodied in said statement of facts. It is true, as alleged by the learned counsel for the respondents, that the certificate of the trial judge bears no date, does not refer to any pages or exhibits, or contain any order referring to exhibits or copies thereof; but it is also true that the form and substance of the certificate are strictly in accordance with the requirements of the statute. Bal. Code, § 5060. It states and certifies "that the matters and proceedings embodied in this statement are matters and proceedings occurring in this cause and that the same are hereby made a part of the record herein," and "that the same contains all the material facts, matters and proceedings heretofore occurring in this cause and not already a part of the record therein." Section 5059 of the Code (Bal.) provides that "depositions and other written evidence on file shall be appropri-

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ately referred to in the proposed bill or statement, and when it is certified the same or copies thereof, if the judge so direct, shall be attached to the bill or statement and shall thereupon become a part thereof." The statement in question does in fact contain purported copies of the "written evidence" in the case, including the deposition and exhibits mentioned in respondents' motion; and the statement itself shows that some, if not all, of the copies of the writings objected to by respondents were expressly permitted by the court, at the trial, to be filed instead of the originals. Moreover, it appears that these written exhibits were mostly read to the court at the time they were introduced in evidence, and it is not claimed or asserted that the copies in the statement are not correct. Under these circumstances we think we ought not to strike from the record or disregard the particular exhibits specified in respondents' motion. They are actually a part of the statement, though not literally "attached" thereto, or referred to by name or number, or by any other designation, in the certificate of the judge; and it would, therefore, seem that the provisions of the statute have been substantially observed in respect to the particular matters under consideration. The objection that the proposed statement of facts was not filed before it was served is not argued or insisted upon in the brief of counsel, and, as a matter of fact, it does not appear to be well taken. It is provided in § 5062, Bal. Code, among other things, that a proposed statement of facts must be filed and served either before or within thirty days after the time begins to run within which an appeal may be taken from the final judgment in the cause, provided, however, that the time therein prescribed may be enlarged either before or after its expiration, once or more, but not for more than sixty days additional in all, by stipu-

lation of the parties, or for good cause shown, and on such terms as may be just, by an order of the court or judge wherein or before whom the cause is pending or was tried, made on notice to the adverse party. In this instance the proposed statement of facts was not served or filed within the thirty days prescribed by the statute, but an application for an extension of the time for sixty days from April 18, 1902, was made to the court, and was heard on notice to the respondents, and granted on the 18th day of June. The application for extension of time and the hearing and determination of the court thereon was made before the expiration of the additional sixty days' time allowed for filing and serving the statement, and the statement was filed and served within the extended time. We find no order in the record fixing a time for settling and certifying the statement of facts. Neither is it shown by the record, or claimed by counsel, that any amendments were ever proposed to the statement within the time limited by law, and in such cases the statement is deemed agreed to, and may be certified by the judge at the instance of either party at any time, on proof being filed of its service, and that no amendments have been proposed. Bal. Code, § 5058. As we have seen, the statement was certified in the manner prescribed by law, and, there being no showing to the contrary, it must be presumed that the action of the court was warranted by the facts before it; or, in other words, that the trial judge did his duty in the premises. The motion to strike the statement as a whole, as well as the motion to strike parts thereof, is denied.

It is conceded by all the parties to this action that the capital stock of the respondent corporation is \$40,000, consisting of 2,000 shares of the par value of \$20 per share; that Stephen M. Nolan died on or about August

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10, 1899, and that at the time of his death he and Helen I. Nolan, his wife, were the owners of 1,911 shares of said corporation stock; that said stock was appraised by the appraisers appointed by the superior court of Pierce county in the matter of the estate of Stephen M. Nolan, deceased, at \$4.75 per share, and that 100 shares thereof were bequeathed to appellant by the will of said decedent; that the respondents John B. Ternes and George B. Kandle were named and appointed in said will as the executors thereof, and that they duly qualified and assumed the duties of such executors; that while acting as such executor the said John B. Ternes purchased for his wife, Mary Ternes, one of the respondents, from appellant, the 100 shares of stock given her by said Nolan, deceased, and paid appellant therefor the sum of \$1,000, and that all the right, title, and interest of appellant in and to said stock was transferred by her to the said Mary Ternes by a bill of sale duly executed and acknowledged, and which authorized and directed the respondent, The Tacoma Carriage & Baggage Transfer Company, to issue and deliver said stock to the respondent Mary Ternes. It is also conceded that the decedent, Nolan, gave 100 shares of this transfer company stock to the respondent John B. Ternes, 200 shares to Mrs. Erickson, 300 shares to Mrs. Heffner, and that the residue thereof was given to the executors, Ternes and Kandle, in trust for one Corinne Brazell. The 1,911 shares of stock which was issued to Stephen M. Nolan, and which stood in his name on the books of the transfer company at the time of his death, being community property, only one-half thereof was subject to his testamentary disposition. The other half belonged, under the law, to Mrs. Nolan. It appears that some time after appellant had sold her stock as above indicated, she ascertained that if she were still the owner, she could sell it for

a higher price than that which she received from Mr. Ternes. She then concluded to rescind her sale, and accordingly notified Mr. and Mrs. Ternes of her desire and intention, and offered to return to them the amount she had received. Her desire to rescind the sale was disregarded, and her offer to return the money paid to her, with interest, rejected. She thereupon instituted this suit for a rescission, alleging, in substance and effect, in her complaint, among other things, that at the time she made the sale she was ignorant of the value of her stock, which was in fact of much greater value than the sum she received for it; that Mr. Ternes, by reason of his position of vice-president and general manager of the transfer company, had full knowledge of the value of the stock, but fraudulently withheld the same from her, and that she was induced to sell her stock for \$1,000 by certain (stated) false and fraudulent representations and concealments of Ternes as to the then condition of the company, and by his false statements that there were no dividends from said stock, and could be no dividends for a long time to come, and by concealing the fact that dividends had been declared; that on discovering the fraud which had been practiced upon her she caused notices of rescission of said sale and transfer of stock to be prepared and served upon the judge of the superior court and the several defendants (naming them), and that at the time of service of such notices she tendered to John B. Ternes and Mary Ternes the sum of \$1,000 in lawful money, and the further sum of \$12.50 as interest thereon, and demanded a return of the contract and sale of stock, but they and each of them refused said tender, and refused to give up or return the contract of sale and transfer, and that she now renews said tender and demand, and

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deposits in court the full amount received by her from Ternes, and rescinds and repudiates her contract and transfer of stock so obtained from her by said Ternes. The trial court, after hearing the testimony of the plaintiff and other evidence produced by her, concluded that the evidence failed to prove the allegations of the complaint—or, in other words, the cause of action alleged—and hence, as we have said, dismissed the complaint.

It is insisted by the learned counsel for appellant that the action was dismissed upon a motion for a nonsuit, and that such a motion is only applicable to cases at law tried by a jury, and, for that reason, if for no other, it was error to grant it. Conceding that the motion for a nonsuit, provided for by our statute, may not be strictly applicable to a purely equitable action, it by no means follows that the court may not, in a proper case, dismiss a complaint or proceeding in equity on motion of the defendant. If the allegations of the complaint and the evidence adduced on the part of the plaintiff are such as to require countervailing or explanatory evidence on the part of the defendant, in order to defeat the action, then the latter should be compelled to produce such evidence, and a motion to dismiss, by whatever name it may be designated, should be denied. But where the evidence of the plaintiff plainly shows that he is entitled to no relief, the action may properly be dismissed, even on the court's own motion. In this instance the motion, as recited in the judgment, was "for judgment dismissing the said action, for the reason that the testimony offered upon the part of the plaintiff was insufficient to grant the plaintiff any relief in this action," and it would seem that it was at least a proper one for the consideration of the court. It is contended on behalf of the appellant that the court below, in granting this

motion, entirely misconceived the nature and character of this action, and proceeded solely upon the theory that this was an action to rescind a sale of personalty on account of false and fraudulent representations on the part of the vendee, and consequently concluded that the burden was upon the appellant to prove the fraud alleged. And it is asserted in appellant's brief that:

"The complaint in this action does not state a good and sufficient cause of action of that character. It was never so intended, any more than it was intended to state a good cause of action in trover or conversion. The gist of the cause of action under consideration is misuse of position and opportunity by an executor of an estate, by the president of a company, by a person acting in a fiduciary relation toward plaintiff—in other words, a trustee; and the claim to relief is based upon a betrayal of confidence and a violation of trust duties and obligations, coupled with fraud and false representations. The fraud and false representations count principally as makeweights to render the explanation which the trustee is bound, under the legal principles which govern this case, to make the court of equity having the case under consideration, simply more impossible."

We have no doubt that there is, in legal contemplation as well as in reason, a clear distinction between the two classes of cases mentioned by appellant's counsel as to the nature and quality of the proof required on the part of the plaintiff. If the action is an ordinary one by a person in his individual capacity, based on actual fraud, no recovery can be had without satisfactory proof of the fraud alleged. But if it is an action by a *cestui que trust* against his trustee, the former may, in some cases, recover by simply showing a transaction on the part of the latter indicating a mere failure to perform a duty or obligation resulting from his trust, although no actual fraud was prac-

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ticed or intended. And while there is no rule of law prohibiting an ordinary trustee from purchasing from a *cestui que trust* the latter's interest in the trust estate, yet, if he does so, "the burden is on him to show a full, fair, and sufficient consideration, and it must appear that the *cestui* had power to sell, and had the fullest information concerning the transaction." 27 Am. & Eng. Enc. Law, 213, and cases cited. And if it appears that such information was not given, and that the consideration was insufficient, the sale will be set aside at the suit of the beneficiary. Lewin, Trusts (Scott's Am. ed.),* p. 484. A trustee whose duty it is to sell merely may not purchase trust property either personally or by his agent, at his own sale, for the obvious reason that in such a case he would be at the same time both seller and buyer. Id., p. *487.

We come now to the consideration of the crucial question in the case, and that is whether, in view of the evidence and the principles of law applicable to cases of this character, the judgment can be sustained either on the theory apparently adopted by the trial court or that urged as the real and legitimate one by counsel for the appellant. It is not practicable to set forth all the evidence in the record, or even to present a satisfactory synopsis of it in this opinion, and we will therefore content ourselves by simply saying that upon the whole case as made by the pleadings and the evidence we are clearly of the opinion that the judgment ought to be affirmed. If appellant's right of action is in fact based upon the alleged fraudulent representations made to her by Ternes, the judgment is clearly right for the reason that she frankly and positively testified, as a witness in her own behalf, that all he (Ternes) told her was by letter, and that she *did not rely*

on *his statements and representations*; that she did not believe what he had told her; that she knew her stock was worth more than she was getting for it, and that she sold it because she wanted to get something out of it. The evidence further shows that the appellant, at her home in California, wrote to Mr. Ternes, saying that she had been offered \$1,000 for her stock, and that, if he wanted it at that price, he could have it; and that he thereafter went there, paid for the stock, and took a bill of sale of it in the name of his wife, Mary Ternes. The testimony of the appellant herself certainly does not entitle her to relief on the ground of willful or (if we may use the term) active fraud on the part of respondent Ternes. Nor is she entitled to relief by reason of "a betrayal of confidence and a violation of trust duties and obligations" by Mr. Ternes. If the respondent Ternes was appellant's trustee, he became such, not by her own act or appointment, but because he was one of the executors of Nolan's will, or because he was an officer of the respondent corporation, and a stockholder therein. And the question arises, what duty or obligation did he owe appellant, pertaining to either of those positions, which he failed to perform? As an executor, it was his duty to collect the assets, pay the debts of the decedent, and the funeral and other necessary expenses, and distribute the residue of the estate in accordance with the will of his testator. In short, it was his duty to take possession of, settle, and distribute the estate; all of which it appears was done with the approval of the court. All that appellant had a right to require at the hands of the executors, or either of them, so far as these shares of stock are concerned, was the delivery of the stock to her or her assigns at the time the estate was settled. This stock was a specific legacy to appellant by the terms

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of the will. She had the right to sell it to whomsoever she pleased, and Mr. Ternes had the right to purchase it for his wife, or even for himself. Schouler, Executors (3d ed.), § 358. Mrs. O'Neile received her own price for it, which was more than twice the appraised value, and the evidence does not show that it was actually worth more at the time of the sale. It is true that some other parties afterwards offered to give her \$1,500 for her stock if she would rescind her sale to Ternes and sell to them, but that was done with the expectation of thereby getting a controlling interest in the corporation. And it seems now that that offer was the real cause of this suit.

As to the contention that the respondent Ternes violated his trust duties and obligations as an officer of the transfer company by not apprising appellant of the true condition of the company and its business, and of the value of its stock, it is perhaps sufficient merely to observe that no such trust relation as is claimed by appellant ever existed between the latter and Mr. Ternes. The rule recognized and adopted by the modern authorities is tersely stated by a late text-writer, speaking of officers of private corporations, as follows:

"The doctrine that officers and directors are trustees of the stockholders applies only in respect to their acts relating to the property or business of the corporation. It does not extend to their private dealings with stockholders or others, though in such dealings they take advantage of knowledge gained through their official position." See 21 Am. & Eng. Enc. Law (2d ed.), 898, and cases cited. See, also, *Carpenter v. Danforth*, 52 Barb. 581.

We find no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ., concur.

[No. 4610. Decided August 15, 1908.]

FRED WAGNER *et ux.*, *Respondents*, v. HENRY MAHRT,
Appellant.

HIGHWAYS — INJUNCTION AGAINST OPENING VACATED ROAD — SUFFICIENCY OF COMPLAINT.

A complaint in an action to restrain a road supervisor from opening a highway through plaintiff's land states a cause of action, when it sets up that such proposed road had formerly been a highway but had been vacated by the county commissioners and relocated elsewhere, even though there was no allegation showing the consent of the property owners whose lands were taken for the relocation of the road, inasmuch as the presumption of such consent would arise in the absence of a showing to the contrary.

SAME — EVIDENCE — OBJECTIONS NOT URGED BELOW.

An objection that the admission in evidence of records of the county commissioners was erroneous, on the ground that only certified copies were competent, cannot be urged on appeal when not specified as a ground on the trial.

SAME — PRESUMPTIONS AS TO VALIDITY OF PROCEEDINGS.

A finding by the court that a petition to the county commissioners for the vacation and relocation of a road was duly and regularly heard and granted raises the presumption that the evidence disclosed that all the necessary steps were taken by the commissioners to give their action validity.

APPEAL — FINDINGS OF COURT — REVIEW.

Findings of fact and conclusions of law will not be reviewed on appeal when the record fails to show exceptions thereto in the trial court.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

R. M. Dye, N. T. Caton and Martin & Grant, for appellant.

Myers & Warren, for respondents.

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The opinion of the court was delivered by

HADLEY, J.—Respondents brought this action to restrain appellant, as road supervisor, from entering upon their premises, and tearing down fences built across what appellant claims is a public highway. The complaint alleges that a public highway once existed at the place where appellant tore down the fences, but that the same was vacated by the board of county commissioners in August, 1892. A temporary restraining order was issued, and appellant thereafter answered the complaint, denying its material allegations, and pleading affirmatively that the road had never been vacated or changed. The cause was tried by the court, and resulted in a judgment that the appellant, as road supervisor, and his successors in office, are enjoined from entering upon said premises, and tearing down the fences or opening up said road through respondents' lands. This appeal is from said judgment.

It is assigned that the court erred in overruling appellant's objection to the introduction of any testimony, for the reason that the complaint does not state a cause of action. We think the complaint states a cause of action. It alleges the former existence of the highway, and that a petition was filed with the board of county commissioners praying for the vacation and change of that portion involved here; that a hearing was had before the county commissioners, and a vacation of the road ordered; that, soon after the vacation, fences were built by the then owner of said premises across said vacated road, and that at all times since 1892 said road has been wholly abandoned as a highway, and has not been used as such; that during all said time, said premises have been fenced on all sides, and all of said land, including the roadbed of the former road, has been under cultivation, and that no

trace of said road now exists. The acts of the appellant in attempting to open up the former road are also alleged. If we understand appellant's point in making this objection, it must be based upon the petition for the vacation of said road. We find in the transcript what purports to be a copy of the petition, but it is not referred to in the complaint as an exhibit, and we are unable to determine from the record that it was actually made a part of the complaint. We will assume, however, that, it was made a part of the complaint, and that the objection, therefore, reached to its contents, even before it was offered in evidence. It is urged that the petition showed that the road proposed to be vacated ran through the lands of one Reynolds, and did not show that the proposed change and re-location was through his lands; that it did show that the proposed re-location was to be upon a section line, and, as it was not shown that said Reynolds owned the land upon both sides of said line, it therefore appeared that at least a portion of the proposed re-location, viz., that upon the other side of the section line, must have been upon lands not owned by Reynolds. Appellant argues from this that, as the petition showed no consent on the part of such other land owner for such occupation by the proposed highway, it was therefore impossible for the commissioners to make the change, and open up such new road without condemnation proceedings, under the decision in *Peterson v. Smith*, 6 Wash. 163 (32 Pac. 1050). It is true the petition did not, in terms, state who was the owner of the lands adjoining the section line upon the other side, but there was no statement therein that negatived the fact that Reynolds may have been such owner, and there was nothing in the petition to negative the fact that some other freeholder who signed the petition and asked for such re-loc-

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tion may not have been such owner. Since the petition does not disclose that consent of the land owner was not had, we think, for the purpose of admitting evidence as to proceedings based upon that petition, it should be presumed, until the contrary appears, that such consent was obtained. It was not error, therefore, to overrule the objection to the introduction of any evidence.

It is urged that it was error to admit in evidence, over appellant's objection, certain records of the county commissioners pertaining to the vacation and re-location of this road, for the reason that only certified copies thereof were competent. The objections did not, however, specify that reason. They were urged upon other specified grounds, and we think for that reason appellant should not be heard to urge that ground of objection now.

The court found the facts essentially as alleged in the complaint, and concluded therefrom that said highway had been regularly vacated, and that appellant was without right seeking to re-open the road. It is now urged that the court erred in making such findings and conclusions. The record discloses no exceptions to the findings of facts or conclusions of law. Appellant is therefore not in position to have them reviewed here. Among other things, the court found:

"That on or about the first day of July, 1891, a petition was filed with the board of county commissioners of said county, praying for the vacation of that portion of said road across said premises, and that the same be changed so as to run along and near the north and west boundaries of said premises; that thereafter and on or about the 5th day of August, 1892, the board of county commissioners of Lincoln county, Washington, at a regular session thereof and after said petition had been duly and regularly brought on for hearing, entered an order granting said petition."

The following conclusion was also entered by the court:

"That that part of said meridian road which formerly extended through said premises as described in paragraph 3 of the findings of facts has been vacated by the board of county commissioners of Lincoln county, Washington, and is not now and has not been since the 5th day of August, 1892, a legal highway of said county."

The trial court having found that the petition was duly and regularly heard and granted, the rule stated in *Smalley v. Laugenour*, 30 Wash. 307 (70 Pac. 786), applies here. The court there said:

"The trial court found that this order was 'regularly made,' which presumes that all of the necessary steps were taken to give it validity, if it was within the power of the court to make it."

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, DUNBAR and MOUNT, JJ., concur.

[No. 4682. Decided August 15, 1903.]

JOHN SCHMITZ, *Respondent*, v. L. F. KIRCHAN, *Appellant*.

APPEAL — SUFFICIENCY OF EVIDENCE.

The verdict of the jury will not be set aside because of insufficiency of the evidence, where there is conflicting evidence upon the material issues.

CIVIL ACTION FOR ASSAULT AND BATTERY — EXCESSIVE DAMAGES.

A verdict of \$225 for damages because of an assault and battery cannot be said to be excessive, even if no permanent injury were inflicted.

SAME — IMPROPER ADMISSION OF EVIDENCE — HARMLESS ERROR.

In an action for damages on account of assault and battery, the improper admission of rebuttal testimony to the effect that defendant had pleaded guilty before a justice of the peace to a

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charge of assault and battery was not prejudicial, where the defendant had already testified that he committed the battery in question.

SAME.

In such an action, the attempt of plaintiff to prove by the justice of the peace that he had been acquitted of a charge of provoking the assault, after the opening statement of counsel had been made to that effect, would not constitute error, when the court did not allow such justice of the peace to proceed farther with his testimony than the identification of plaintiff with such trial, whereupon all further testimony in connection with the provoke case was excluded.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

E. D. Reiter and Myers & Warren, for appellant.

Martin & Grant, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—This is an action to recover damages for injuries received from an assault and battery. From a judgment for \$225 in favor of plaintiff, defendant appeals. One of the errors assigned is the insufficiency of the evidence to justify the verdict. It is undisputed that the defendant struck the plaintiff in the face once or twice with his fist, blacking his eye, and knocking a piece of skin off his cheek. The plaintiff testified, also, that there was some internal injury to his head, which gathered and broke periodically, and which he thought was caused by broken bones in his nose, resulting from the effect of the blow by the defendant, and that his eyesight was affected, so that he could not do his work as well as formerly, and that he had not summoned medical aid for these ailments because he could not afford the expense. On the other hand, a physician who examined plaintiff immediately after the affray told him then, and

testified on the stand, that the injuries did not amount to anything. It appeared also that the plaintiff went to work the next day after the affray, and had been able to pursue his ordinary calling at all times since. We think there was here such a conflict in the evidence as required the submission of the plaintiff's right to recover to the jury, and, this being so, we ought not to set aside their verdict for want of evidence. The other objection, that nothing more than nominal damages should have been allowed, is also without merit. If plaintiff was entitled to anything at all, he was entitled to substantial damages, and there is nothing to show that the award made was excessive, or the result of passion or prejudice.

Immediately after committing the assault and battery, defendant went before a justice of the peace, and pleaded guilty to the crime of assault and battery. On this trial the justice was placed upon the stand by plaintiff in rebuttal, and questioned concerning that prosecution, in the course of which he was asked, "What was the termination of that case?" and, over objection, answered, "He pleaded guilty." This was objected to, on the ground that it was improper as rebuttal, inasmuch as the defendant had already testified that he did strike plaintiff, and consequently there was no issue upon that matter, and, further, that it should have been proven by the record. The very fact, however, that the defendant had admitted the battery rendered the error, if any, harmless. The plea of guilty was admissible on plaintiff's case in chief, as an admission of the act charged (Wharton on Evidence, § 783), and in rebuttal to contradict the defendant, and while there seems to be little purpose for its introduction after the assault and battery had been admitted, we cannot say that it was in any way prejudicial.

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The attorney for plaintiff, in his opening statement to the jury, said that he would prove that the defendant, at the time he pleaded guilty of assaulting the plaintiff, had the plaintiff arrested under the statute making it a misdemeanor for any person to provoke, or attempt to provoke, another person to commit an assault, and that the plaintiff on a trial for the alleged offense had been promptly acquitted by a jury. Later on, he called as a witness one G. K. Birge who testified as follows (we quote from the record):

"Q. State your name to the jury. A. G. K. Birge. Q. What official position with reference to the precinct did you hold last June? A. Justice of the peace. Q. Did you have a case of the State vs. John Smith last June? A. I did. Q. I will ask you to turn to that proceeding. I will ask you who was the prosecuting witness in that case? Mr. Myers: Objects. The Court: Sustains the objection. Plaintiff excepts to the ruling of the court. Q. I will ask you, Mr. Birge, if the case mentioned in your book as being the State of Washington vs. John Smith, if that is the John Smith here? A. It is. Q. I will ask you if the facts which were the foundation of that action existed between Mr. Kirchan and Mr. Smith? Mr. Myers objects as incompetent, irrelevant and immaterial. The Court: He may answer. Defendant excepts to the ruling of the court. A. Yes. Mr. Martin. I now offer a certified copy of the judgment in that case. Mr. Myers. To which the defendant objects upon the ground that it is incompetent, irrelevant and immaterial. The Court sustains the objection."

The appellant argues that this evidence, taken together with the appellant's opening statement, made it clear to the jury that the plaintiff had been acquitted of a charge of attempting to provoke an assault, based upon the facts then in question before the jury, and that it was error to admit any evidence of that trial before the jury. But we

think the conclusion the defendant draws from this part of the record is not warranted by anything contained in it. The opening statement of counsel was not evidence, and, moreover, was not even objected to, and clearly there is nothing in the evidence above quoted which could in the remotest degree inform the jury as to the nature or result of the action tried before him in which the state was plaintiff and the plaintiff here was defendant. The examination was merely preliminary, and was properly allowed to proceed until the matter to which it was introductory was reached.

As we find no substantial error in the record, the judgment will stand affirmed.

HADLEY, ANDERS, DUNBAR and MOUNT, JJ., concur.

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| 33 | 550 |
| 33 | 357 |
| 32 | 550 |
| 34 | 393 |
| 32 | 550 |
| 36 | 586 |

[No. 4685. Decided August 15, 1903.]

THE STATE OF WASHINGTON *on the Relation of E. Hill, Respondent*, v. J. H. GARDNER, *Sheriff of Lincoln County, Appellant*.

MANDAMUS — AGAINST SHERIFF — COMPELLING RELEASE OF EXEMPT PROPERTY — INADEQUACY OF REPLEVIN.

Mandamus will lie to compel a sheriff to release exempt property held by him under attachment for the reason that replevin does not furnish a speedy remedy, since it may result in withholding possession from the debtor until the end of an extended litigation.

SAME.

Under Bal. Code, § 5755, which provides that mandamus will lie "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," a sheriff is bound to return upon demand exempt goods which he had levied upon, where the creditor has not demanded an ap-

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praisement thereof within a reasonable time, inasmuch as Bal. Code, § 5255, provides that upon the debtor's furnishing the officer with a list of his personal property, together with that claimed as exempt, the officer shall return with his process the list of property claimed as exempt, in case no appraisement thereof had been required by the creditor (Fullerton, C. J., dissents).

ATTACHMENT — EFFECT OF APPEARANCE — WAIVER OF EXEMPTIONS.

No time being specified in the statute when the debtor shall claim his property as exempt from levy, his appearance and motion for the dissolution of an attachment would not constitute a waiver of the right to claim his exemptions.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Affirmed.

E. A. Hesseltine and Myers & Warren, for appellant:

The relator had an adequate remedy by replevin. *Thebault v. Lennon*, 64 Pac. 449; *Collett v. Allison*, 25 Pac. 516; *Habershaw v. Sears*, 5 Pac. 208; *Gass v. Van Wagner*, 63 Mich. 610; *Carlson v. Small*, 32 Minn. 492; *Coolcy v. Davis*, 34 Iowa, 128; *Mallory v. Berry*, 16 Kan. 293; *Richards v. Kirkpatrick*, 53 Cal. 433; *Carruth v. Grassie*, 71 Am. Dec. 707.

Martin & Grant, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This is a mandamus proceeding to compel the sheriff of Lincoln county to release to the relator certain personal property which has been seized by the sheriff and taken into his possession by virtue of a writ of attachment. The attachment writ was issued in an action wherein one Parrish was plaintiff and the relator was defendant. In the attachment proceeding the relator here, as defendant therein, appeared, and moved for the dissolution of the attachment and for the release of the property. The motion was denied, and the relator appealed to this court

from the order denying the motion. Said appeal is still pending and undetermined. After taking the appeal, the relator under oath made and delivered to the sheriff a list of all his personal property, and at the same time and place he delivered to him an itemized list of all his personal property claimed by him to be exempt, and demanded the release of the same, which was refused. After a period of about twenty days from the presentation of said lists and the making of said demand this proceeding was commenced. The trial court issued an alternative writ of mandate, and at the hearing, after considering the evidence, found that the relator is entitled to the release of certain property as exempt. A peremptory writ of mandate was ordered, directing the said sheriff and his successor in office to forthwith deliver such exempt property to the relator. This appeal is from that judgment.

The appellant urges that the motion to quash the alternative writ should have been sustained, for the reason that the relator had an adequate remedy by replevin. Under § 5756, Bal. Code, the writ of mandate must be issued in all cases "where there is not a plain, speedy and adequate remedy in the ordinary course of law." It is insisted that such a remedy existed, and that the writ was improperly issued. Whatever might be said of this as an original question, this court has already upheld mandamus as a proper proceeding in such a case. *State ex rel. Achey v. Creech*, 18 Wash. 186 (51 Pac. 363). Appellant suggests that the opinion in that case does not disclose that the propriety of the remedy by mandamus was challenged, but that it rather appears that the contest was concerning the right of an abandoned wife to claim exemptions of community property in the absence of her husband. We have examined the briefs submitted in that

case and find that the exact point raised here was urged then. It was insisted that *State ex rel. Gannon v. Hitt*, 13 Wash. 547 (43 Pac. 638), was decisive that mandamus would not lie in the case then before the court. But the court took the view that the remedy by replevin or claim and delivery was not sufficiently speedy and adequate. The opinion is short, and does not enlarge upon the reasons which led the court to its decision upon that branch of the case. It may be added here, however, by way of argument in support of the rule adopted then, that in an action of replevin the claimant must give a bond in order to procure an immediate delivery of the property, and even then the person in possession may retain the same by giving a re-delivery bond. §§ 5420, 5422, Bal. Code. The object of the exemption statutes is to accord to the householder the immediate possession and use of the exempt property for the benefit of the family. It may well be said that replevin does not furnish a speedy remedy, since it may result in withholding possession until the end of an extended litigation, during which time the family is deprived of that which the law intends shall be uninterruptedly held for its use. In any event, however, we shall not depart from the rule adopted in the former case.

Mandamus will lie "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station." § 5755, Bal. Code. What was the duty of the sheriff in the premises? The relator had complied with the provisions of § 5255, Bal. Code, in furnishing to the officer a list of all his personal property, and also of that which he claimed as exempt. The same section gave to the attaching creditor the right to have the property appraised, but it appears that no demand was made for an appraisal. No time is fixed within which such demand shall be made, and a reasonable

time must, therefore, have been intended. Twenty days had elapsed in this case, which was certainly more than a reasonable time. Referring to the property claimed as exempt, the same section provides that "the property therein specified shall be exempt from levy and sale." No appraisement having been demanded to test the accuracy of the specified exemptions, the property was, therefore, exempt from levy, and it became the manifest duty of the officer to release it from the levy under which he held it. At the trial, upon the return to the alternative writ, the court also heard evidence as to the vocation, married relation, and residence of the relator, and the character of the property claimed as exempt. From the facts found, the exemptibility of the property described in the court's judgment was determined, and from the evidence in the record we shall not disturb the findings or the conclusions thereon.

It is next urged that the relator waived his claim to exemption by reason of appearing and moving to dissolve the attachment without first making claim for the exemption. No time is specified in the statute when the claim for exemption shall be made. In *Wiss v. Stewart*, 16 Wash. 376 (47 Pac. 736), this court held that, even under the law of 1895, requiring a formal record declaration of homestead, the same may be selected at any time before sale, saying:

"The latter act in no way affects the provision in relation to the time of making the selection, but simply undertakes to direct the manner of such selection, and the provision that such homestead may be selected at any time before sale is still in effect."

By analogy we think a similar rule should apply to exemptions of personal property, and that the claim may be made within any reasonable time before sale. This

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seems to be a wholesome rule for the protection of the family. Circumstances might arise where the actual seizure of the property might not be known until near the time of sale. When there has been no express waiver, and no conduct that must lead to the conclusion that a waiver was intended, the right may be exercised at any time before sale.

“Waiver, it has been said, is a question of intention, to be determined as a fact. Conduct or consent, therefore, to show a waiver, should be inconsistent with an intention to claim exemptions. This proposition is not laid down in express terms in any reported case, but it is clearly sustained by the decisions.” 12 Am. & Eng. Enc. Law (2d ed.), 197.

We are unable to see that the prompt effort to dissolve the attachment was inconsistent with an intention to claim exemptions. It may rather be said to have been consistent therewith, since we must assume that the relator in good faith believed the attachment should be dissolved for legal reasons, and that no claim of exemption would be necessary as against a wrongful attachment. When the attachment was, however, at least temporarily held good by the refusal to dissolve it on motion, the claim for exemption was made. We think the relator's course was not a waiver of his right to exemption.

The judgment is affirmed.

MOUNT and DUNBAR, JJ., concur.

ANDERS, J. (concurring). Were it not for the former rulings of this court to the effect that an officer holding property under a valid writ, and which is claimed by the debtor as exempt from seizure and sale, may be compelled to deliver the same to such debtor, I should feel strongly inclined to hold that the judgment ought to be reversed

for the reason that the delivering of this property by the sheriff to the relator is not, under the admitted facts in this case, "an act especially enjoined by law," and therefore not enforceable by mandamus. The language of the law prescribing the duty of the sheriff in cases like this is as follows:

"In case no appraisalment be required, the officer shall return with the process the list of the property claimed as exempt by the debtor." Bal. Code, § 5255.

And in view of that provision of the statute, it is somewhat difficult for me to see how the sheriff could be peremptorily commanded to release the property held by him under the writ of attachment. But, inasmuch as it seems to have been heretofore decided by this court that mandamus is a proper remedy in cases like the one at bar, I am constrained to concur in the opinion written by Judge HADLEY.

FULLERTON, C. J. (dissenting). Inasmuch as this court has heretofore adopted the rule that mandamus will lie to compel an officer who has levied upon personal property of a judgment debtor to turn back to such debtor the property which he has the right to claim and does claim as exempt, and inasmuch as the merits of such a controversy can be tried under the statutory writ of mandamus, I am willing to adhere to the rule so adopted, notwithstanding I think it an application of the writ not warranted by the common law, nor contemplated by the statutes. I cannot assent, however, to the second position taken in the opinion, namely, that § 5255 of Bal. Code furnishes an exclusive remedy for contesting the validity of an exemption claim where the value of the property claimed is all that is in contest. The statute cited does not in terms provide that the remedy therein provided for shall be exclusive

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Syllabus.

of this question, and, as was said by this court in *Christ Church v. Beach*, 7 Wash. 65 (33 Pac. 1053), quoting from Sutherland on Statutory Construction, "Where a statute gives a new remedy for a right existing and enforceable either at common law or in equity, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two." This being the rule, the judgment creditor, through the officer levying the writ, had a right to contest the validity of the debtor's claim to the property by showing at the hearing on the writ that it grossly exceeded in value the amount allowed as exempt under the statute. As the trial court refused to allow him to contest the claim on this ground, I think the judgment should be reversed.

[No. 4341. Decided September 8, 1903.]

ALFRED COOLIDGE, *Respondent*, v. CHARLES SCHERING
et al., *Appellants*.

FORECLOSURE OF MORTGAGE — QUESTION OF PARAMOUNT TITLE.

The question of paramount title may be determined in a suit to foreclose a mortgage, if the parties voluntarily submit such question for determination.

VENDOR AND PURCHASER — UNAUTHORIZED CONVEYANCE BY CORPORATE
OFFICER — RATIFICATION — TITLE ACQUIRED — LIEN OF PRIOR UN-
RECORDED MORTGAGE.

A mortgagee of land belonging to a corporation who fails to have his mortgage recorded, has no lien as against a subsequent grantee under a conveyance unauthorized by the corporation, who takes without notice of the prior mortgage, if the circumstances are such as to estop the corporation from denying the authorization.

CORPORATIONS — CONVEYANCE BY OFFICER — AUTHORITY — ESTOPPEL.

Where an officer of a corporation in sole charge of its business falsely represents that he has been authorized to make a sale of certain of its real estate, and fraudulently connives with a fictitious officer to make a conveyance thereof, and the corporation makes no move to disaffirm the conveyance for two years after discovery of the fraud, it is estopped to deny the authority of such officer.

Appeal from Superior Court, Whatcom County.—Hon. JEREMIAH NETERER, Judge. Reversed.

Jesse A. Frye, Newman & Howard and Thomas D. J. Healy, for appellants.

T. O. Abbott, for respondent.

The opinion of the court was delivered by

MOUNT, J.—Prior to January 26, 1898, the Sehome Improvement Company, a corporation, was the owner of section 11, township 37 N., of range 4 E., W. M., in Whatcom county. On that date the said company executed and delivered to Alfred Coolidge a mortgage on said section of land, together with other lands, to secure the payment of two promissory notes amounting to \$10,500. This mortgage was not recorded until June 20, 1899. About December 1, 1898, one E. Bartlett Webster, who was at that time secretary and treasurer of the Sehome Improvement Company, and the only person in charge of the general office of the company, and who had full charge and control thereof, and was authorized to transact all the business of the company, entered into negotiations with appellant Charles Schering to sell to him the said section of land, representing that he was authorized to sell this and other lands at \$4 per acre. He exhibited to Schering a false entry in the minute books of the company to that effect. Schering refused to purchase

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the land for cash, but offered to exchange fifty shares of the capital stock of the Bellingham Bay Gas Company, of the value of \$1,500, for the said section of land. Webster thereupon notified Schering that he was not authorized to exchange the land for said stock, but could only sell for cash. Thereafter, on the morning of January 9, 1899, Webster falsely notified Schering that a meeting of the trustees of the Sehome Improvement Company had been held on the previous day, and that he had been authorized to trade the land for the fifty shares of gas stock; that pressing and important business had prevented him from transcribing the minutes of the meeting on the minute books of the company, but that the same would be done, and would show authority in him to make the trade. Schering thereupon examined an abstract of the title to the real estate, and found the title clear in the Sehome Improvement Company. The mortgage to Coolidge, above referred to, was not shown upon the abstract, and was not of record, and Schering had no notice or knowledge thereof. Schering, relying upon the record title of the land and the representations of the secretary as to his authority to sell, purchased the land, and assigned and delivered to Webster the fifty shares of gas stock. Webster thereupon delivered to Schering a warranty deed regular upon its face, signed by the Sehome Improvement Company, by himself as secretary and one F. D. Alexander as vice president. The consideration expressed in the deed was \$1. Alexander was not vice president of the company, but this fact was unknown to Schering. This deed was recorded by Schering on the day it was delivered to him, viz., January 10, 1899. Some time in June, 1899, A. F. McClaine, president of the Sehome Improvement Company, was informed that the real estate had been transferred to Schering. On June

20, 1899, Coolidge placed his mortgage of record. On the 8th day of June, 1900, Schering and wife sold the property to Mary Wasmer, since deceased, but pending the litigation and prior to her death Mary Wasmer conveyed the property to her daughter, Emma Schering, the wife of Charles Schering. Said Webster remained in Whatcom, as secretary and treasurer of the Sehome Improvement Company, up to December 1, 1900, when he sold the gas stock, pocketed the proceeds, and left the state. The Sehome Improvement Company received no benefit therefrom. Although the president of the Sehome Improvement Company was advised and knew in June, 1899, that said property had been conveyed by deed regular upon its face to Charles Schering, no notice that the same was unauthorized was given to Schering or his transferees until the commencement of this action on January 10, 1901. Thereafter, on June 10, 1901, a resolution was passed by the trustees of the Sehome Improvement Company repudiating the acts of the secretary in selling the land to Schering. This action was brought by Coolidge on January 10, 1901, to foreclose his mortgage. The Sehome Improvement Company and all other defendants defaulted except Charles Schering, Emma Schering, his wife, and Mary Wasmer, who answered jointly, denying generally the allegations of the complaint, and by way of affirmative defense set up a prior paramount title in Mary Wasmer. Plaintiff thereupon replied, denying title in Mary Wasmer, and this was the only disputed issue in the case.

In *Oates v. Shuey*, 25 Wash. 597 (66 Pac. 58) we held that questions of paramount title cannot be tried in suits for foreclosure of mortgages, but it was there said that a defendant "might have appeared in the action, and voluntarily submitted the question of her paramount title

for determination, and would, in that event, have been bound by the decision thereon." This was done in this case, and the court below, after finding the facts substantially as above stated, entered a judgment upon conclusions of law as follows:

"That the plaintiff is entitled to a decree foreclosing his mortgage upon all the property described in said mortgage, and that such decree should contain the usual provisions and directions of a decree in foreclosure cases: providing, however, that said decree of foreclosure, in so far as it affects section 11, shall be made subject to the taxes paid by said Mary Wasmer, amounting to \$868.96, together with legal interest thereon from the date of the several payments of said taxes until paid; and also subject and inferior to a lien of \$1,500, the value of said gas stock which was exchanged for said land, together with legal interest thereon from the 10th day of January, A. D. 1899, until paid, and that said two amounts and interest due thereon be declared a prior lien upon the said section 11, and that said lien be declared in favor of Emma Schering, who has succeeded to the rights and interest of the said Mary Wasmer; and that said lands should be sold, and the proceeds derived from the sale of said section 11 should be applied first to the payment of the moneys due for said taxes and interest thereon and to the payment of the said \$1,500 and interest thereon, and the balance of the proceeds derived from the sale of said section 11 be applied to the payment of the amount found to be due plaintiff."

The effect of this decree is to set aside the sale and give the purchaser a prior lien on the land for the purchase money and taxes paid. Both parties appeal.

It seems to us there is but one question in this case, and that a question of law, viz., under the undisputed facts, did Schering or his assigns acquire title to the real estate in question? There can be no middle ground. Schering either acquired title to the land, or he acquired

no interest therein as against Coolidge, the mortgagee. There can be no doubt that, if the Sehome Improvement Company, after it had mortgaged the land to Coolidge, had sold it for value to Schering, without notice of the mortgage, actual or constructive, Schering would have taken the land freed from the lien of the mortgage. Bal. Code, § 4535; Jones, *Mortgages* (5th ed.), § 456, 527. Even if such sale were intended by the seller to be in fraud of the rights of Coolidge, Coolidge could not, in that event, be permitted to reimburse Schering, an innocent purchaser, and thereby assert his mortgage against the land. If Coolidge desired to prevent a sale of the land except the same be made subject to his mortgage, he should have filed his mortgage for record. Not having done so for more than a year after it was delivered to him, he cannot be heard to complain against one who purchases without notice or knowledge of his mortgage. But it is argued that Webster had no authority to sell or convey the land, and therefore no sale was made by the Sehome Improvement Company to Schering. There is nothing in the record to show what business the Sehome Improvement Company was engaged in, but it was shown and found by the trial court

“That on the 10th day of January, 1899, and up to and until the 1st day of December, A. D. 1900, one E. Bartlett Webster was the duly elected, qualified, and acting secretary and treasurer of the defendant the Sehome Improvement Company, and that as such officer he had full and complete charge of the business and office of said Sehome Improvement Company on Bellingham Bay, which said office was the principal place of business of said corporation, and that the said E. Bartlett Webster was the only person on Bellingham Bay who was in or about or connected with the said company's office, or who had anything to do in or about the business affairs or office

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of said company at said place, and was, so far as the public knew, in full charge and control of the company's affairs in the said city of Whatcom, and was authorized to transact all the business of said company at said place."

When, in addition to these facts, it was also shown that the secretary had issued a deed regular upon its face, it certainly devolved upon the plaintiff to show want of authority in the agent of the Sehome Improvement Company to make the transfer, and also that persons dealing with him had, or should have had, notice of such want of authority. There is no evidence in the record tending to show that Schering had such notice, or should have had it. On the other hand, the evidence shows that Schering examined the minutes of the company, and found there authority for Webster to sell the property. He was told by Webster that the trustees had given him authority to make this particular transfer. There was no other officer or agent of the company in Whatcom of whom inquiries could be made. The other officers of the company resided elsewhere, and paid little or no attention to the business of the company. As was said in *New York & N. H. R. R. Co. v. Schuyler*, 34 N. Y., at page 69:

"The rule which governs this class of cases, in my judgment, rests upon a sound principle. As was said by SELDEN, J., in *Griswold v. Haven*, 'The mode in which the liability is enforced in all these cases is by estoppel *in pais*. The agent or partner has in each case made a representation as to a fact essential to his power, upon the faith of which the other party has acted, and the principal or firm is precluded from controverting the fact so represented. It goes back to the celebrated aphorism of Lord HOLT in *Hern v. Nichols* (1 Salk. 289): 'For, seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver, should be a loser than a stranger,' or, as more tersely expressed by ASHURST, J., in *Lick-*

barren v. Mason (2 T. R. 70), "Whenever one of two innocent parties must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." " *Merchants' Bank v. State Bank*, 10 Wall. 646.

It is also shown that the president of the company knew about the transfer in June, 1899, and no steps were taken by the trustees of the company to repudiate the transfer until June 10, 1901, long after this action was begun, and then the only action taken was a resolution spread upon the minutes repudiating the sale. Coolidge, the mortgagee, was also a trustee of the company. Under these circumstances we think the language used in *Martin v. Webb*, 110 U. S. 7 (3 Sup. Ct. 428) is particularly applicable:

"Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than, from time to time, elect the officers of the bank, and to make declarations of dividends. That which they ought, by proper diligence, to have known as to the general course of the business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

If the transfer of the land by a deed valid upon its face was fraudulently made by the agent of the Sehome Improvement Company, such deed was not void, but only voidable as to that company, which could either ratify the sale or repudiate it and set aside the conveyance by a proper action. *Sawtelle v. Weymouth*, 14 Wash. 21 (43 Pac. 1101); *Preston-Parton Mill. Co. v. Dexter Hor-*

ton & Co., 22 Wash. 236 (60 Pac. 412, 79 Am. St. Rep. 928). As we have seen above, it made no effort to disaffirm the transfer until two years after it had acquired the knowledge thereof, and then only by a resolution repudiating it. Under these circumstances, if an action had been brought by the Sehome Improvement Company to set aside the sale on the ground of want of authority in Webster to make it, the company, after the lapse of time the sale was permitted to stand unchallenged after knowledge, and after the purchaser had again sold the property, would have been estopped to say that the secretary was not authorized to make it. If Coolidge, the mortgagee, has any right to litigate the question of authority in Webster to make the sale, he has no greater or other right than the Sehome Improvement Company. He had his mortgage at the time of this sale. He had neglected to record it for nearly a year prior to the sale, and did not record it until five months after the sale and transfer had been made. His lien, therefore, did not attach until after the transfer, and then only to the interest of the mortgagor in the property at the time the mortgage was recorded. If the mortgagor had no interest at that time, Coolidge had none. Clearly, therefore, if the mortgagor is estopped to dispute the authority of Webster to make a conveyance of the land, Coolidge is also estopped. For these reasons the plaintiff cannot be held to say that his mortgage is a prior lien upon the land.

The judgment is therefore reversed in so far as it makes the plaintiff's mortgage a lien on section 11, and the title to said section is declared to be in Emma Schering, free from the plaintiff's mortgage; appellant Emma Schering to recover her costs.

FULLERTON, C. J., and DUNBAR and ANDERS JJ., concur.

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[No. 4431. Decided September 8, 1903.]

E. J. VOSS, *Respondent*, v. A. J. BENDER *et al.*, *Appellants*.

WRONGFUL ATTACHMENT — ACTION ON BOND — MISJOINDER OF CAUSES.

In an action on an attachment bond, a complaint asking damages for the value of the goods, for expenses incurred in dissolving the attachment, for loss of time occasioned by the wrongful issuance of the writ, and for attorneys' fees in the action on the bond, is not demurrable on the ground of joining actions *ex contractu* and *ex delicto*, inasmuch as all the damages arise out of the attachment for which the bond had been given.

SAME — PROBABLE CAUSE — ADVICE OF COUNSEL — WHEN QUESTION FOR JURY

The question of probable cause for the issuance of a wrongful attachment, though on the advice of an attorney, is one for the jury and not for the court, where there is evidence tending to show that the attorney was falsely informed as to the facts, or not put in possession of all the facts.

TRIAL — ATTORNEY AS WITNESS — WAIVER OF RIGHT TO ARGUE CAUSE — RULES OF COURT.

Under Bal. Code, § 4993, subd. 5, which provides that parties litigant may address the court and jury, either in person or by counsel, a party may waive his right to argument, and a rule of court depriving an attorney of the right to argue his cause to the jury, when he has given evidence on the merits in behalf of his client, creates a condition which amounts to a waiver of the right, and therefore in no sense conflicts with the privilege conferred by the statute.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Nash & Nash (*James Dawson*, of counsel), for appellants:

Respondent sues all the appellants on the attachment bond, and appellant Bender, for wrongfully and maliciously suing out the attachment—commingling two causes

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of action in one complaint and improperly joining actions *ex contractu* and *ex delicto*. *Willey v. Nichols*, 18 Wash. 528; *Hoye v. Raymond*, 25 Kan. 666; *Hart v. Metropolitan El. Ry. Co.*, 7 N. Y. Supp. 753; *Clinton v. Nelson*, 2 Utah, 284; *Ghiradelli v. Bourland*, 32 Cal. 585. These authorities all deal with actions where recovery was sought on bonds and for torts, and are selected with a view of presenting to the court from the great number of general authorities on the question cases that are directly in point.

Crow & Williams, for respondent:

The complaint will show that the action is in contract and not in tort. The only damages claimed are compensatory, or actual, damages, based upon the actual losses of respondent. There is no uncertainty as to any of these damages. They are not exemplary or punitive, but are of such a character as to be covered by the terms of the bond. *Saunders v. United States Marble Co.*, 25 Wash. 479; *Schilling v. Black*, 31 Pac. 143; *Jones v. Steamship Cor-tes*, 17 Cal. 495; *Pfister v. Dascey*, 4 Pac. 393; *Brewer v. Temple*, 15 How. Pr. 286; *Robinson v. Flint*, 16 How. Pr. 240.

The opinion of the court was delivered by

MOUNT, J.—This is an action upon an attachment bond. Upon a jury trial in the court below, the plaintiff recovered the full amount of the bond. Defendants appeal.

The errors alleged are that the court overruled a demurrer to the complaint, based upon the ground that the complaint joined an action in tort with one in contract; that the evidence showed that the defendants had probable cause to believe the ground upon which the attachment

issued; that the court permitted plaintiff's attorney to attack in his argument to the jury the defense based on the advice of counsel in suing out the writ of attachment; that the court refused to permit one of defendants' counsel to argue the case to the jury; and that the court permitted plaintiff's attorney to read certain notes to the jury. The complaint alleges, in substance, the commencement of the action in which the writ of attachment was sued out, the giving of the bond in the sum of \$800, the issuance of the writ of attachment, and the levy of the writ upon plaintiff's property, of the value of \$850; that the property was taken from the possession of the plaintiff and sold, and was never returned to the plaintiff; that thereafter the writ was dissolved, and subsequently, upon a trial of the main action, a verdict and judgment were rendered in favor of the defendant therein, plaintiff in this action; "that said writ of attachment was oppressively, wrongfully, and maliciously sued out, and there was no reasonable cause to believe the grounds, or any of the grounds, upon which said writ of attachment was issued to be true, and said writ was so sued out by the defendant A. J. Bender maliciously, for the purpose and with the intention of injuring and destroying this plaintiff's said business, and depriving him of his property." The complaint then alleges that plaintiff was compelled to employ the services of attorneys to dissolve the attachment; that the reasonable value of said services was \$200; that he lost fifteen days' time, of the value of \$75; and that \$225 is a reasonable attorney's fee in this action. The prayer of the complaint was for \$1,350, being the amount of the damages, as stated above.

The complaint does not purport upon its face to state more than one cause of action. That cause is upon the contract to indemnify the plaintiff for "the damages he may sustain . . . should said attachment be wrongfully, oppressively, or maliciously sued out." It is true

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the complaint asked for damages for the value of the goods, for expenses incurred in dissolving the attachment, for loss of time, and for attorneys' fees in this action. But these are damages flowing from one cause. They are damages arising out of the attachment for which the bond was given to protect the plaintiff. There is no misjoinder in the complaint of causes of action *ex contractu* with causes *ex delicto*. The demurrer was properly denied.

It is next argued that appellants' motion for a judgment should have been granted because appellant Bender had reasonable and probable cause to believe the grounds upon which the attachment issued. One of appellants' attorneys testified substantially that Bender stated the facts to him, and produced certain other witnesses, who were examined by the attorney, and that he thereupon advised the attachment. It is argued that, because of this advice, probable cause for the attachment will be presumed. It was said by this court in *Levy v. Fleischner, Mayer & Co.*, 12 Wash. 15 (40 Pac. 384):

" . . . it is the well established law that probable cause is a question of law, in this far, at least, that probable cause will be presumed when the action has been commenced by the advice of attorneys to whom has been submitted all the facts in the case."

That was a case where there was no controversy as to the question whether the action was brought by the advice of counsel familiar with all the facts. In this case the question was not disputed that one of the attorneys advised the attachment, but it was disputed that all the facts in the case had been submitted to him, and it was claimed by respondent that the evidence of appellant Bender shows that he had stated to his attorney as facts things which he knew were untrue, and had no reason to believe. Where the attorney is falsely informed as to the facts, and is not put in possession of all of the facts, the advice of the

attorney is not conclusive. The question of probable cause must then be left to the jury. In *Levy v. Fleischer, Mayer & Co.*, this court quoted approvingly from *Burton v. St. Paul, etc., Ry. Co.*, 33 Minn. 189 (22 N. W. 300), as follows:

“What facts, and whether particular facts, constitute probable cause is a question exclusively for the court. What facts exist in a particular case, where there is a dispute in reference to them, is a question exclusively for the jury. When the facts are in controversy, the subject of probable cause should be submitted to the jury, either for specific findings of the facts, or with instructions from the court as to what facts will constitute probable cause. ‘These rules,’ says the court, ‘involve an apparent anomaly, and yet few, if any, rules of the common law rest upon a greater unanimity or strength of authority;’ citing many authorities.”

The trial court in this case fully and fairly instructed the jury, in substance, that if they found that appellant Bender in good faith related to his attorney all the facts in the case, and that the attorney in good faith investigated the facts, and thereupon advised the attachment, respondent could not recover. But, if they found that Bender did not truthfully state the facts to his attorney, and made statements which were false, and upon such statements the advice was given, such advice would not constitute a defense to the action. These instructions were proper, and the finding of the jury upon the facts is conclusive now.

From what we have said above, it is unnecessary to notice the next assignment of error.

It is next claimed as error that the court refused to permit L. B. Nash, one of appellants’ counsel, to argue the case to the jury. Appellants had two attorneys present at the trial, viz., J. R. Dawson and Mr. Nash. Mr.

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Nash was a witness in the case. A rule of the superior court provides:

"If an attorney offers himself as a witness on behalf of his client and gives evidence on the merits, he shall not argue the case to the jury unless by permission of the court."

It is argued that this rule is in conflict with subdivision 5 of § 4993, Bal. Code, which provides as follows:

" . . . the plaintiff or party having the burden of proof may, by himself or one counsel, address the court and jury upon the law and facts of the case, after which the adverse party may address the court and jury in like manner by himself and one counsel, or by two counsel, and be followed by the party or counsel of the party first addressing the court."

Under this statute, either party may waive his right to make an argument upon the facts to the jury. The rule above quoted provides for a condition which is a waiver of the right, and which right may not thereafter be exercised, except by permission of the court. The attorney, when he offered himself as a witness, thereby waived his right to argument. The rule is not in conflict with the statute, and is a salutary one, because, where attorneys make witnesses of themselves, and then argue their evidence to the jury, it is often difficult for the jury to draw the line between the evidence and the argument of the attorney. The court in this case did not err in refusing permission to the attorney to argue the case.

Upon the last question, the record fails to show that plaintiff's counsel read any notes or evidence to the jury. For that reason, we shall not consider the question.

There is no error in the record. The judgment appealed from is therefore affirmed.

FULLERTON, C. J., and DUNBAR and ANDERS, JJ., concur.

[No. 4684. Decided September 8, 1903.]

KEENE GUARANTY SAVINGS BANK, *Respondent*, v. ABRAM
E. LAWRENCE, *Appellant*.

MORTGAGE — PRIORITY — ESTOPPEL.

Knowledge by a mortgagee of an action seeking to establish a prior lien over the mortgaged premises in favor of another would not estop the mortgagee from denying the validity of a decree declaring a prior lien, when the mortgagee had not been made a party to the action and served with process.

SAME — ASSIGNEE NOT BOUND BY ASSIGNOR'S KNOWLEDGE OF EQUITIES.

Knowledge on the part of the assignor of a mortgage that a third party had an equitable lien against the premises would not affect the rights of an assignee who took without knowledge, actual or constructive, of the rights of such third party.

NOTARY PUBLIC — MORTGAGE TO CORPORATION — ACKNOWLEDGMENT BEFORE CORPORATE OFFICER.

The fact that a notary public is an officer in a corporation to which a mortgage is executed would not preclude his taking the acknowledgment of the mortgagor, as that is merely a ministerial act.

FOREIGN CORPORATIONS — TRANSACTION OF BUSINESS WITHIN STATE.

The purchase by a foreign corporation of a promissory note or mortgage in this state, with no intention of doing any other act here, is not a transaction of business within the meaning of the statute requiring every such corporation, before transacting business within this state, to record a certified copy of its articles of incorporation and appoint an agent within the state upon whom process can be served.

MECHANICS' LIENS — DATE OF COMMENCEMENT FOR FURNISHING MATERIALS.

The inception of a material man's lien is governed by the date of the actual furnishing of materials and not by the date of the contract therefor.

Appeal from Superior Court, Yakima County.—Hon.
FRANK H. RUDKIN, Judge. Affirmed.

Whitson & Parker and *J. H. Snively*, for appellant:

It is undisputed that the acknowledgment of the mortgage made by Cadwell to the Mason Mortgage Loan Company, which the Keene Guaranty Savings Bank seeks to foreclose in this action, was taken before Allen C. Mason, a notary public, who was at the time a stockholder, president and chief executive officer of said company, and who conducted all the negotiations concerning, and who finally closed, the loan with Cadwell. The acknowledgment was void. *Kothe v. Krag-Reynolds Co.*, 50 N. E. 594; *Hedbloom v. Pierson*, 90 N. W. 218; *Horbach v. Tyrrell*, 67 N. W. 485 (37 L. R. A. 434); *Smith v. Clark*, 69 N. W. 1011; *Miles v. Kelly*, 40 S. W. 599; *Workman's Mutual Aid Ass'n v. Monroe*, 53 S. W. 1029; *Bezar Building & Loan Ass'n v. Heady*, 50 S. W. 1079.

Graves & Englehart and *D. J. Crowley*, for respondent.

PER CURIAM.—The Keene Guaranty Savings Bank brought an action against Abram E. Lawrence to foreclose a certain mortgage on lots in the city of North Yakima. Prior to the commencement of the foreclosure suit Lawrence had instituted an action to cancel the same mortgage as a cloud upon his title. The two actions were consolidated and tried as one, and from a judgment against Lawrence this appeal is prosecuted.

The premises in controversy were, in the year 1889, the property of James H. Thomas, and on July 13th of that year Thomas and wife executed their bond for a conveyance of the lots to one Cadwell, who assigned the bond to one Lloyd, by whom it was assigned to the First National Bank of North Yakima to secure Lloyd's notes to the bank for \$3,000, \$4,000 and \$4,200, respectively;

Cadwell's notes to Lloyd for like amounts and times of payment being also assigned to the bank as collateral security. Cadwell and Lloyd were partners in the purchase of the lots and the erection of a building thereon. At the time the loan was made Thomas and wife executed a deed to Cadwell for these lots, and the same was placed in escrow with the bank, to be delivered upon payment of the purchase price. The bank retained this deed, contract for conveyance, and the notes, but failed to put the assignment of the bond on record. On October 26, 1889, there was placed of record another deed from Thomas and wife to Cadwell for the same lots, dated back to July 3d of that year, but not acknowledged until September 11th, thus showing the legal title in Cadwell, without anything of record to indicate the bank's equitable lien. On the 16th day of December, 1889, Cadwell made a mortgage to the Mason Mortgage Loan Company for \$10,000 upon these lots, the mortgage being acknowledged before Allen C. Mason as a notary public, he at the time being president of the mortgage company. The mortgage was filed for record December 23, 1889. The Mason Mortgage Loan Company, in its regular course of business, on receiving this mortgage, notified the Keene Guaranty Savings Bank at its office in Keene, New Hampshire, that it had the same for sale; that it was a first mortgage and lien on the above-described property, and was a good investment. After some negotiations, the mortgage and notes were sold and assigned to the respondent on the 4th day of February, 1890, upon the payment of their full face value, and this assignment was filed for record in the auditor's office of Yakima county on February 8, 1890. On the 13th day of June, 1890, the First National Bank began an action against Cadwell

and the Mason Mortgage Loan Company to set aside and cancel the mortgage, but did not make the Keene Guaranty Savings Bank a party. A decree was entered adjudging that the lien of the First National Bank, by reason of the bond assigned to it and deed in escrow as aforesaid, was prior to the lien of the mortgage to the extent of \$8,037.85 on account of moneys advanced by the loan company after notice of the circumstances under which the bank claimed a lien, and directing a sale of the property to satisfy the bank's claim. Under this decree the lots were sold, and Abram E. Lawrence, the appellant here, became the purchaser, and now holds a sheriff's deed therefor. No decree was entered cancelling the mortgage or in any way barring the rights of the respondent, the Keene Guaranty Savings Bank. The appellant also de-rains title under a mechanic's lien foreclosure. On the 4th day of September, 1889, Cadwell acting for himself and Lloyd, made a contract with the firm of Whittier, Fuller & Co. to supply certain material for the construction of a building on the lots in controversy. On the 11th day of June, 1890, the said firm filed a claim of lien against the property, which was duly recorded in the county auditor's office, and on May 11, 1891, in a suit brought to foreclose said lien, recovered judgment against Cadwell and Lloyd for \$2,936.60, and the property was sold thereunder to one Plummer, to whom in due course a sheriff's deed was issued, and the property was thereafter conveyed by him to appellant. The respondent was not made a party defendant in the suit for the enforcement of the mechanic's lien.

It is contended that the court erred in finding that the interest and title of appellant in the premises in controversy is subject and inferior to the mortgage of the re-

spondent, that said mortgage is a first and prior lien, and that respondent is entitled to a decree enforcing and foreclosing said mortgage and ordering a sale of said premises to satisfy same. In support of this contention it is urged that the arrangement whereby the First National Bank advanced money to Cadwell and Lloyd to pay the purchase price of the lots, taking as security the assignment of the bond for a deed and the deposit of the deed itself in escrow, constituted an equitable mortgage, whose lien was afterward enforced by action; that the record of the assignment to respondent of the mortgage held by it was not constructive notice, as there was no law at the time authorizing such record, and hence the respondent was not a necessary party to the action brought to declare the claim of the First National Bank a prior lien over its mortgage; and that respondent is bound by the judgment against the Mason Mortgage Loan Company on the score of being privy to the judgment against its assignor. It is further suggested that respondent had notice of both the actions under which appellant claims to derive title, and is therefore estopped, because it failed to intervene therein for the protection of its rights. It is sufficient answer to the latter suggestion to say that it was not necessary for respondent to appear, where it had not been made a party and served with process, even if it had notice of the pendency of the actions. Conceding that the First National Bank undoubtedly had a lien capable of enforcement, the record discloses that the respondent and its assignor each took the mortgage and paid valid consideration therefor while the record title was clear. The mortgage was certainly valid, and passed into the hands of an innocent purchaser for value. Knowledge, if any, on the part of the mortgagee, prior to the

assignment, that a third party had an equitable lien against the premises, would not affect the rights of respondent, who had no notice, actual or constructive, of the rights of third parties. See *Congregational Church Building Society v. Scandinavian Free Church*, 24 Wash. 433 (64 Pac. 750). We are satisfied that the finding and conclusion of the lower court in favor of the priority of respondent's mortgage are in accordance with law and fact.

The validity of the mortgage to the Mason Mortgage Loan Company is attacked on the ground that the acknowledgment of the mortgagor was taken before a notary public, who was also at the same time the president and chief executive officer of the mortgagee company, and who conducted the negotiations leading up to the loan. The mere fact that the notary in this case was an officer and stockholder in the corporation to whom the mortgage was executed would not preclude his taking the acknowledgment of the mortgagor. The taking of an acknowledgment by a notary public is a ministerial act, and may be performed by any one qualified to act as notary. *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501 (58 Pac. 672); *Nixon v. Post*, 13 Wash. 181 (43 Pac. 23); *People for use of Munson v. Bartels*, 138 Ill. 322 (27 N. E. 1091); *Learned v. Riley*, 14 Allen, 113; *Gibson v. Norway Savings Bank*, 69 Me. 582; *Stevenson v. Brasher*, 90 Ky. 23 (13 S. W. 242); 1 Am. & Eng. Enc. Law (2d ed.), pp. 485-487.

Among the errors assigned is the permitting of the plaintiff to maintain its action without complying with the laws of this state relating to foreign corporations, as found in Bal. Code, § 4289, and Laws 1899, p. 100, licensing corporations, and inflicting a penalty for the

unauthorized transaction of business. The only business appellant did in this state, as shown by the record, was to purchase this mortgage, which was sent to it and sold to it at its banking house in Keene, New Hampshire. The purchase by a foreign corporation of a promissory note or a mortgage in a state, with no purpose of doing any other act there, is not a transaction of business within the meaning of the statute requiring every such corporation, before transacting business in the state, to record a certified copy of its articles of incorporation and appoint an agent within the state upon whom process can be served. *Commercial Bank v. Sherman*, 28 Ore. 573 (43 Pac. 658, 52 Am. St. Rep. 811); *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 (5 Sup. Ct. 739).

Appellant claims that he acquired a good title to the lots under the foreclosure by Whittier, Fuller & Co. of their mechanic's lien thereon. But the evidence shows that materials were not furnished for use in the building until March 14, 1890, while respondent's mortgage had been of record since December 23, 1889. It is true the contract for furnishing this material was entered into in September, 1889, but the date of the actual furnishing of the material governs the inception of the lien. *Hutting Bros. Mfg. Co. v. Denny Hotel Co.*, 6 Wash. 122 (32 Pac. 1073); *Home Savings & Loan Ass'n v. Burton*, 20 Wash. 688 (56 Pac. 940). Under these decisions the lien of the material man was clearly inferior to that of the mortgage.

We find no error in either the findings or conclusions of the trial court, and the judgment is accordingly affirmed.

Sept. 1903.] Opinion of the Court.—HADLEY, J.

[No. 4507. Decided September 9, 1903.]

ALEX. D. McMILLAN, *Respondent*, v. NORTH STAR MINING COMPANY, *Appellant*.

MASTER AND SERVANT — NEGLIGENCE OF MASTER — ASSUMPTION OF RISK.

A miner injured by the explosion of a missed blast, left in a mine by contractors who had done work there for defendant prior to such miner's employment, cannot be held to have assumed such danger as a risk of his employment, where he had no knowledge of such unexploded blast either through information from others or by personal inspection.

SAME — SAFE PLACE TO WORK — UNEXPLODED BLASTS — DUTY OF MASTER.

It is the duty of a mining company, although it has let a contract for tunneling, to keep itself advised as to the possibility of missed blasts, so as to be in a position to warn employees subsequently placed at work in the tunnel after the cessation of the contract work.

Appeal from Superior Court, Spokane County.—Hon. LEANDER H. PRATHER, Judge. Affirmed.

Frank T. Post, for appellant.

Del Cary Smith and *A. J. Laughon*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Respondent brought this suit against the appellant to recover damages for injuries received while he was working in appellant's mine. A tunnel had already been driven for a distance of more than two hundred feet by others who had worked under a contract with appellant, but who had quit the work. Respondent and another were employed by appellant to continue work in this tunnel. The employment was made by appellant's foreman, who directed where the work should be done. The tunnel had

the appearance of having been well cleaned up by the former workmen, and the foreman did not warn the respondent or his fellow workman of any hidden danger. Neither respondent nor his associate had ever before worked in the tunnel, and neither had any knowledge of any concealed danger. Respondent was directed to work at the face of the tunnel, and his companion was ordered to work upon the "drift", a short distance from respondent. They began work in the afternoon, and continued until the morning of the second day following. Meanwhile respondent had exploded several blasts at the face of the tunnel, and on the morning above mentioned was engaged in "mucking out". A loose plank floor had been laid upon the bottom of the tunnel, near the face, in order that the broken material might be more easily shoveled. The face having been moved forward somewhat by the work of respondent, he was about preparing to move this floor nearer to the face. While engaged in cleaning and smoothing the bottom of the tunnel between the ends of the planks and the face, he was using his pick, and when he struck a place near the ends of the planks an explosion occurred, which resulted in the destruction of one of his eyes and in permanent injury to his hearing. He alleged in his complaint that the former contractors who had worked in the tunnel for the appellant had used certain explosives for blasting purposes, and that one of the charges had been so placed that it failed to discharge, and was left by them in an unsafe and dangerous condition; that he had neither knowledge nor means of obtaining knowledge of such dangerous condition, and while engaged as aforesaid he struck said unexploded blast, which caused said explosion. He further alleges that his injuries were caused by the negligence of appellant in failing to pro-

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vide a safe place for him to work, and that, if appellant had used ordinary care in inspecting the tunnel before ordering him to work therein, the unexploded charge would have been discovered, but that it wholly neglected to examine the tunnel after the explosion of blasts to ascertain if all blasts had been exploded, and to see if the tunnel was in safe condition for respondent and others employed to work therein, and also failed to warn respondent of such dangerous condition. The answer denies many of the material allegations of the complaint, and alleges that after the said contractors ceased to work in the mine, and before respondent began to work therein, the appellant, through its superintendent, a skilled and competent miner, thoroughly examined and inspected the mine, and found no missing or unexploded blasts; that said inspector did not report any missing blasts or any other danger to appellant, and that it did all that was reasonably required of it to be done to ascertain the condition of the tunnel before respondent began to work therein; that whatever risks or dangers there were from unexploded blasts were incidents of respondent's employment, and were assumed by him; that respondent knew when he went to work in the tunnel that the work just previously done therein had been done by said contractors, and he had the same opportunity for knowing of the risks and dangers that appellant had. A trial was had before a jury, and at the conclusion of respondent's testimony the appellant challenged the sufficiency thereof, and moved the court to instruct the jury to return a verdict for appellant. The motion was denied, and appellant thereupon rested without introducing any testimony. The cause was then submitted to the jury under instructions from the court, and a verdict for respondent was returned in the sum of \$3,380. Ap-

pellant moved for a new trial, which was denied, and judgment was entered for the amount of the verdict. This appeal is from that judgment.

It is assigned that the court erred in not granting the motion to return a verdict for the defendant. It is admitted by the appellant that the master must use reasonable care to provide his servant with a reasonably safe place to work, under all the circumstances of the particular case. It is urged, however, that, under the circumstances of this case, if respondent was not required to be his own inspector, and did not assume the risk, then it was the duty of the appellant to carefully inspect the tunnel, but that respondent must establish by evidence two things: First, that the appellant did not carefully inspect; and, second, that if such inspection had been made the missing blast would have been discovered. Respondent was asked the following question: "Was there anything, Mr. McMillan, when you went to work by which you could tell or ascertain if there were any missed holes or unexploded blasts in the tunnel, or any part of it?" To which he answered "No." From the fact that respondent was an experienced miner, and says, in effect, that nothing appeared by which he could have discovered the danger, appellant reasons that its own superintendent, also an experienced miner, could not have made the discovery. There was no direct evidence that an examination was not in fact made by appellant's superintendent, and it is insisted that the burden was upon the respondent to show that no inspection was made. It is contended that, as the evidence stood, it must be presumed that an inspection was made; that, under respondent's own testimony, such inspection could not have revealed the hidden danger, and that appellant has, therefore, neglected no duty in the premises, since it is not claimed that it had actual

knowledge of the danger. It seems to us that a broader view must be taken of appellant's duty toward its employees. It had previously let a contract to certain persons to do specified work in its mine. While it may have contented itself with the belief that it did not need to be represented by a superintendent while that work was being done according to the contract specifications, yet, considering the hazardous nature of the mining occupation, and the well-known possibility of missing blasts, we think it was the duty of appellant to keep itself advised in that particular as the work progressed. If a trusted representative, stationed at the mine for that purpose, had kept watch of the location of the different charges, and of the conditions following the various explosions, it is not improbable that the missing blasts would have been discovered at the time, and the hidden danger avoided. Such a course would at least have lessened the probability of carelessness and of reckless oversight on the part of the contractors, and might have led to actual knowledge on appellant's part of the missing blast which seems to have caused respondent's injury. If appellant chose for the time being to turn over the work in its mine to others, knowing, as it must have known, that such hidden dangers, by oversight and lack of skillfulness, might be left by them to be encountered by other employees who should follow them, we think it should not be heard to say that it is in no way responsible for the conditions. Such persons must be held to have stood in the place of the appellant itself, since to them had been delegated the authority to conduct the operations in the mine for the time being. In *Shannon v. Consolidated, etc., Mining Co.*, 24 Wash. 119 (64 Pac. 169), this court held that the danger from an unexploded blast is not such as is necessarily incident to the employment, the risk of

which must be assumed by the miner. In some cases, it is true, the miner must assume the risk—as, for instance, when the missing charge is left by himself or with his knowledge, and when he may have been warned by others that unexploded charges remain in the vicinity of his work. A reasonable degree of observation and care is, of course, required upon the part of the miner, to the end that he shall not negligently contribute to his own injury, but, when he has no knowledge of the presence of a hidden danger placed by others, he should not be required to assume the risk thereof, without regard to the necessary care upon his own part. Dangers arising from a missing blast cannot be classified with dangers which are incidental to nature's hidden forces, and which cannot be known or foreseen by human prescience. The risk of such a miner must often assume, from the nature of his occupation, and for the reason that no degree of care on the part of the master can in some instances provide against the danger. But the conditions here are quite similar to those in *Shannon v. Consolidated etc., Mining Co., supra*. There the workmen were divided into shifts working at different times, each shift taking its turn. By rule established by custom in the mine, it was the duty of the boss of the off-going shift to notify the on-coming shift of any missed blasts. It was contended that that duty was neglected by the boss of the off-going shift, which left the work just before the on-coming of the shift which was at work when the accident occurred. It was held that the duty to notify the on-coming shift of the missed blast was a positive duty of the master, and that such duty having been delegated to the boss of the former shift his neglect to notify the next one was the neglect of the master. So in the case at bar the contractors who

had previously conducted operations in the mine sustained toward appellant and the workmen who succeeded them the relation of a former shift. Having no other delegated representative for that purpose, appellant had, in law, delegated to them the duty to notify others of the location of missed blasts. It was therefore their duty, when they left the work, either to notify appellant or the workmen who succeeded them. As appellant's delegated representatives, their failure to notify it cannot be urged as an excuse for lack of knowledge on its part. Appellant cites *Davis v. Trade Dollar Consolidated Mining Co.*, 117 Fed. 122 (54 C. C. A. 636), as supporting the contention that the danger from a missed blast is one incident to the work. It was held that the danger in that case was such, but it will be observed that the plaintiff there had been informed of the missed blasts before he began work, and the doctrine applied in that case is in harmony with what we have said above. We therefore think sufficient evidence had appeared, bearing upon the question of appellant's negligence, to call for the submission of the case to the jury, and that the motion for a directed verdict in appellant's favor was properly denied.

Appellant rests its chief contention upon the questions involved in the foregoing discussion. Errors are assigned upon certain instructions of the court, and upon the refusal to give others requested by the appellant. We believe, however, that the charge of the court, taken as a whole, fairly covers the law of the case relating to appellant's rights in the premises, and we believe that no prejudicial error is shown in the record. The judgment is therefore affirmed.

FULLERTON, C. J. and MOUNT and DUNBAR, JJ., concur.

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[No. 4407. Decided September 10, 1903.]

SAMISH RIVER BOOM COMPANY v. UNION BOOM COMPANY.

EMINENT DOMAIN — APPROPRIATION BY ONE CORPORATION OF PROPERTY OF ANOTHER.

Property held by a corporation, even though actually devoted to a public use, may be taken for a public use by another corporation having the right of eminent domain, provided it is not taken to be used for the same purpose and in the same manner.

SAME — GRANT OF POWER — HOW DETERMINED.

The power of a corporation to take lands already devoted to a public use cannot be presumed simply from a general grant of power to condemn, but must be given either in express terms or by necessary implication.

SAME — BOOM COMPANIES — RIGHT TO CONDEMN PROPERTY.

Bal. Code, § 4379, which requires a boom company, after filing its articles of incorporation, to file with the secretary of state within ninety days thereafter "a plat of survey of so much of the shore lines of the waters of the state and lands contiguous thereto" as it proposes to appropriate for its corporate purposes, is a grant, by necessary implication, of the power of selecting the designated location by condemnation or otherwise.

SAME — RIGHT NOT AFFECTED BY PRIOR TRESPASS.

The fact that a boom company took possession of lands belonging to the state and used them for boom purposes before acquiring any right thereto, would not affect its power to condemn the same when subsequently sold by the state to another boom company, when the latter had never been in actual possession of the land so as to be able to use it for boom purposes.

SAME — BAD FAITH.

The fact that the company thereafter extended its boom works further down the river than as at first located would not show such bad faith as to affect its right of condemnation.

SAME — NECESSITY FOR TAKING — WHAT CONSTITUTES.

The "necessity" required to be shown for the appropriation of private property does not mean an absolute and unconditional necessity as determined by physical causes, but a reasonable necessity under the circumstances of the particular case.

SAME — CONTESTANTS FOR SAME LOCATION — PRIORITIES.

Where different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right.

Original Application for Certiorari.

Million & Houser, for petitioner:

The evidence in this case shows that there are abundant and ample facilities for boom works besides the particular tract occupied by the petitioner. The testimony disputing this shows that it is simply a matter of convenience or economy with respondent and not a case of necessity recognized by the law. *Appeal of Sharon Railway*, 17 Atl. 234; *Union Terminal R. R. Co. v. K. C. Belt Ry. Co.*, 60 Pac. 541; *Barre Ry. Co. v. Montpelier & W. R. R. Co.*, 17 Atl. 923. It is unquestionably the law that one corporation cannot condemn the property in use by another for the same purpose, but property not in use nor absolutely necessary to the enjoyment of the franchise may be condemned by another company of the same character. *Baltimore & O. S. W. Ry. Co. v. Board of Comr's*, 58 N. E. 837; *In re Rochester Water Com'rs*, 66 N. Y. 413; *Morris & E. R. R. Co. v. Central R. R. Co.*, 31 N. J. Law, 213; *In re New York, L. & W. R. R. Co.*, 99 N. Y. 13 (1 N. E. 27); *Eastern R. R. Co. v. Boston & M. Railroad*, 111 Mass. 125; *Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. R. Co.*, 35 Mich. 265; *Peoria, P. & J. R. R. Co. v. Peoria & S. R. R. Co.*, 66 Ill. 174; *North Carolina & R. & D. R. R. Co. v. Carolina Cent. Ry. Co.*, 83 N. C. 489; *Wheeling Bridge Co. v. Wheeling & Belmont Bridge Co.*, 34 W. Va. 155. Mere priority of acquisition gives no exclusive right, except in so far as the condemnation trenches upon the fixed

necessities of the other franchise. *East St. Louis Con. Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ill. 265; *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. R. Co.*, 97 Ill. 506. The rights of prior occupation cannot be divested by a rival corporation either by purchase or condemnation. *Union Terminal R. R. Co. v. Kansas City Belt Ry. Co.*, 60 Pac. 541; *Sioux City R. R. Co. v. C. M. & St. P. Ry.*, 27 Fed. 770. The rule of the greater necessity does not apply to property actually in use and occupied by a corporation in the same business as that of the company seeking to obtain possession by virtue of purchase or condemnation, as we have already seen. The respondent having purchased land already in use by another corporation, acquired no rights of possession therein on the ground of its public necessity under its franchise. *Scranton Gas & Water Co. v. Northern Coal & Iron Co.*, 192 Pa. St. 80; *St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 28 S. W. 483; *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 41 Pac. 232 (31 L. R. A. 298); *Appeal of Sharon Railway*, 17 Atl. 234; *Barre Ry. Co. v. Montpelier & W. R. R. Co.*, 17 Atl. 923. Conceding for the sake of argument that petitioner was technically a trespasser as against the state, we have already seen that the liabilities which attach to an ordinary case of trespass do not apply to a corporation seeking to condemn property already reduced to its possession and devoted to public utilities under its franchise. As further supporting the above proposition see: *Searl v. School District*, 133 U. S. 564 (33 L. ed. 740); *Cory v. Chicago, B. & K. C. Ry. Co.*, 100 Mo. 292 (13 S. W. 348); *State ex rel. Moody v. Jacksonville, etc., R. R. Co.*, 20 Fla. 649; *Toledo, etc., Ry. Co. v. Dunlap*, 47 Mich. 456. But whatever petitioner's possession may have been as between it

and the state, respondent did not acquire the power of confiscation by virtue of its purchase. It is not in a position to raise the question.

Elihu R. Sherman, for respondent:

One company cannot condemn franchises and property of another for the same purpose, except that portion not in use or not necessary for the exercise of its franchise, unless that right is expressly given by the statute. *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 137; *Lake Erie & W. R. R. Co. v. Seneca County*, 57 Fed. 945; *State v. Paterson*, 39 Atl. 680; *Lake Shore & M. S. Ry. Co. v. New York, C. & St. L. Ry. Co.*, 8 Fed. 858; *Contra Costa R. R. Co. v. Moss*, 23 Cal. 323. Here the property is not in use by respondent but it is necessary to the purposes of respondent and would have been used by it had it not been kept out of possession by petitioner. Authority given in general terms is not sufficient to authorize the taking, for an inconsistent use, of property already devoted to a public use. 9 Am. St. Rep., notes on pp. 142-143; *Louisville & N. Ry. Co. v. Whitley County Court*, 44 Am. St. Rep. 220; *Oregon Cascade Ry. Co. v. Baily*, 3 Ore. 164; *Eastern Ry. Co. v. Boston & Maine Ry. Co.*, 15 Am. Rep. 18; *City Council of Augusta v. Georgia R. R. & Banking Co.*, 26 S. E. 499; *Little Nestucca Road Co. v. Tillamook County*, 31 Ore. 1. In this state no right is given by statute to one company to condemn the property of another company having the right of eminent domain. Even where the right to condemn property of another corporation is given by statute, it must be shown that the public use to which the property is to be devoted is more necessary. *Butte Ry. Co. v. Montana Union Ry. Co.*, 41 Pac. 232 (31 L. R. A. 298). In the present case there is no

showing of greater necessity by the petitioner. The use to which the property will be devoted is the same whether petitioner or respondent owns the land. The public will be as well served by respondent as by petitioner. And to warrant the taking of property already devoted to public use, it is essential that the new use be a different use. *East St. Louis Con. Ry. Co. v. East St. Louis Union Ry. Co.*, 108 Ill. 265; *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. R. Co.*, 97 Ill. 506; *Chicago & N. W. Ry. Co. v. Chicago & E. R. R. Co.*, 112 Ill. 589. If this is allowed as recited in the opinion of the court in *In re N. Y., L. & W. R. R. Co.*, 99 N. Y. 23, this evil would result: A corporation (No. 1) having the right of eminent domain takes land from a similar corporation (No. 2) having the same right; No. 2 thereupon proceeds to condemn it for its own use, and No. 1 retaliates and so the absurd process goes on. The necessity must arise out of the nature of things itself and must not be created by the company seeking the appropriation for the sake of convenience or economy, and the necessity cannot override the real necessities of the respondent corporation. *Appeal of Sharon Ry. Co.*, 9 Am. St. Rep. 135; *Appeal of Pittsburgh Junction R. R. Co.*, 9 Am. St. Rep. 128; *Lake Shore & M. S. Ry. Co. v. New York, C. & St. L. Ry. Co.*, 8 Fed. 858; *St. Louis, H. & K. C. Ry. Co. v. Hannibal Union Depot Co.*, 28 S. W. 485. But the main proposition involved in this case is that even if priority of location and occupation give priority of right, it can only be where they are made for the express purpose of securing a permanent right. The possession and occupation must be lawful. A company in possession adversely or as licensee cannot thereby predicate any right from its priority. *Minneapolis & St. L. Ry. Co. v. Minneapolis Western Ry. Co.*, 63 N. W. 1035.

The opinion of the court was delivered by

ANDERS, J.—This is an application for a writ of certiorari to review the judgment of the superior court of Skagit county dismissing the petition of the Samish River Boom Company to condemn certain lands situate at or near the mouth of the Samish river, in said county. The sufficiency of the petition is not questioned. It is in form and substance the usual petition in condemnation cases with the additional allegation that the petitioner is, and for a long time has been, in possession of and using the lands therein mentioned for booming purposes. The respondent answered, denying the right and the necessity of condemnation, and alleging, in substance, that it purchased the land in controversy from the state of Washington for booming purposes, that the possession of petitioner was illegal and adverse, that the petitioner was estopped by its conduct from claiming the right of a condemnor, and that respondent would have used the lands in question for booming purposes had it not been kept out of possession of the same by petitioner. After hearing and considering the testimony introduced by the respective parties, the court denied the right of the petitioner to condemn the lands described in the petition, refused “to call a jury to assess the compensation and damages to the respondent for appropriating such property,” and dismissed the petition at the cost of petitioner. The petitioner thereupon appealed to this court, but the appeal was dismissed on the ground that the order of the court refusing to call a jury was not reviewable by appeal.

The petitioner, Samish River Boom Company, was organized and incorporated as a boom company on March 13, 1900, under laws of this state relating to the organization, management, and control of such companies; and,

within ninety days after filing its articles of incorporation, it filed in the office of the secretary of state a plat or survey of so much of the shore line of the waters of the state, and lands contiguous thereto, as it proposed to appropriate for booming purposes. Ever since the incorporation, the petitioner has been doing business as a boom company on the Samish river, and the evidence shows that it handled about 20,000,000 feet of timber products during the year 1901. Its appliances for holding, sorting, and rafting logs are located partly on tide lands on the north side of the river, and extend up from the mouth of the stream about 6,000 feet. It is this strip of land, said to contain about fourteen acres, that petitioner seeks to condemn. The respondent was organized as a boom company under the laws of this state on or about March 13, 1901. Its articles of incorporation and its plat or survey of appropriation were duly filed, but it has done no business as a boom company at any time since its organization. At the time the respondent was incorporated, the petitioner, as we have already said, was, and ever since has been, in possession of the land in question, and using it in the prosecution of its corporate business; but the land itself, being tide land, originally belonged to the state. On May 23, 1901, the respondent purchased from the state a large tract of tide land, part of which lies on the south and the remainder on the north shore line of Samish river, and includes the strip of land occupied by the boomworks of the petitioner. It also appears from the evidence that the south shore line of the river and the north shore line not occupied by the petitioner, as well as the tide lands at the mouth of the river, are unoccupied; and, according to the testimony of a witness for the petitioner, who had been engaged in the logging business on Samish river both be-

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fore and since the incorporation of petitioner, the south side of the river is also available for booming purposes. One of the officers of the respondent company testifies that there are more tide lands on the south side of the river than on the north, but they are shallower (that is, the water is not so deep when the tide is in); that there would be plenty of room for a boom in width, but not in depth, and that logs could not be handled there on account of sand bars in the river; that it was the intention of respondent when it purchased the tide land to utilize 6,000 feet or more on the north side of the river by catching, booming, and rafting logs; that the object in buying on both sides of the river was to regulate the passage there so that the respondent would not be interfered with by constant suits for interrupting navigation, and for the purpose of storing logs or shingle bolts in case they came down; and that its rights would be destroyed by the taking of this land by petitioner.

Our statutes authorize the incorporation of boom companies, and prescribe their powers and duties. They have power to acquire and hold, by lease or purchase, and to use and transfer, all such property as shall be necessary for carrying on the business of such corporations. They also have the right to appropriate land, shore rights, and other property necessary for corporate purposes whenever they are unable to agree with the owners of the same as to the amount of compensation to be paid therefor, and such compensation may be assessed and determined and the appropriation made in the manner provided by law for the appropriation of private property by railways. Bal. Code, § 4378. It was the duty of the superior court, under our statute relating to eminent domain, at the preliminary hearing of the petition, to direct the sheriff to

summon a jury to assess the damages which would result to the respondent by reason of the appropriation and use of the land described in the petition, if there was satisfactory proof (1) that the respondent had been duly served with the prescribed notice; (2) that the contemplated use for which this tide or shore land is sought to be appropriated is really a public use; and (3) that the property sought to be appropriated is required and necessary for the purposes of petitioner's enterprise. Bal. Code, § 5640. It is not claimed that any party interested in this land was not served with notice of the hearing of the petition, or that the contemplated use for which the land is sought to be appropriated is not a public use. The respondent was represented by counsel at the hearing, and testimony was given in its behalf; and the proof, we think, shows beyond question that the "contemplated use" is a public one. And whether the learned judge, in denying petitioner's request for a jury to assess respondent's damages, proceeded upon the theory that the evidence failed to establish a necessity for the proposed appropriation, is not disclosed by the record. It seems, however, to be understood by counsel for petitioner that the ruling of the court "was based on the theory that one corporation cannot condemn the property of another corporation of like character, to be used for like purposes." And if the decision of the court was in fact founded on such theory, it was laboring under a misconception of the law applicable to cases of this character, as we understand it. The power to take private property for public use is one of the recognized powers of sovereignty, and is inherent in the state. It is a power recognized, but not granted, by the constitution. *Mills, Eminent Domain*, § 1; *Lake Shore & M. S. Ry. Co. v. Chicago & W. I. R. R. Co.*, 97 Ill. 506. The right to determine under what circumstances and to

what extent that power may be exercised, and to provide the manner of its exercise, is vested exclusively in the legislature. *Lake Shore, etc., Ry. Co. v. Railroad Co., supra*; Mills, Eminent Domain, § 11. And that the legislature never intended that property owned by a corporation should, merely by reason of such ownership, be exempt from appropriation under the law of eminent domain, is evident from the fact that, in prescribing the mode of procedure in condemnation proceedings, it provided the manner of serving corporations, as well as individuals, with notice of the time when and the place where the petition will be presented to the court. Bal. Code, § 5638. Moreover, the constitution of the state clearly recognizes the power of the legislature to authorize the taking of the property of private corporations for public use, for it expressly provides that "the exercise of the right of eminent domain shall never be so abridged or construed as to prevent the legislature from taking the property and franchises of incorporated companies and subjecting them to public use the same as the property of individuals." Constitution, art. 12, § 10. There can be no doubt that property held by a corporation simply as a proprietor may be taken for public use by another corporation having the right of eminent domain. And even property actually devoted to public use is still subject to the power of eminent domain, except that "it cannot be taken to be used for the same purpose in the same manner," as that would amount simply to a taking of property from one and giving it to another, without any benefit or advantage whatever to the public—an act which the legislature is powerless to authorize. Lewis, Eminent Domain (2d ed.), § 276; *Lake Shore, etc., Co. v. Railroad Co., supra*.

But while it is true that the state has power to delegate to corporations the right to take property for public use which has already been appropriated to such use, subject to the qualification above noted, yet the right to take property already devoted to and in public use must be given either in express terms or by necessary implication, and will not be presumed simply from a general grant of power to condemn. Lewis, *Eminent Domain* (2d ed.), § 276, and cases cited; Thompson, *Corporations*, § 5619. This doctrine is invoked by counsel for the respondent in support of the ruling of the court below, and it is argued that the shore lands in question cannot be taken for use of petitioner, for the reason that in this state no right is given by statute to one company to condemn the property of another company having the right of eminent domain. It is also asserted on behalf of the respondent that "in this case the condemnation would devote the property to identically the same use as the owner has already devoted it, and would simply be a change of ownership, and condemnation should never be allowed for this purpose alone." But we are unable to accept these propositions as strictly correct in point of fact. We have hereinbefore endeavored to show that, under our law of eminent domain, property held or owned by a corporation, and not actually devoted to public use, may be taken by another corporation having the right to condemn private property. And in our judgment no valid reason could be given why such should not be the law. It appears clear to us that a contrary conclusion must, of necessity, be based on the fallacious and unwarranted assumption that the mere property of a corporation is held by a more stable and sacred tenure than that of a natural person. The property of a corporation is, in one sense, private property, and, as such, it is subject to taxation, and may be taken on execution in payment of

corporate debts. But the public may have such an interest in the use, in a particular manner, of the property of one corporation, as will prevent another corporation from taking it by condemnation for the same use in the same way. It is admitted that the respondent is not using and has not used the land in dispute for corporate purposes, and it would therefore seem to follow that if it has, as it claims, devoted it to public use, it has done so simply by properly filing its articles of incorporation and its plat or map of appropriation, with the intention of thereafter using it for the purposes of its business. But if it be true that those acts and that intention constituted an appropriation of the property to public use by the respondent, it must also be true that like acts and a like intention on the part of the petitioner would have a like effect; and therefore the argument on behalf of the respondent, based on the above mentioned acts, is equally as forceful in favor of the petitioner. At the time these corporations filed their respective plats, neither of them was the owner of the tide lands described therein; but the petitioner proceeded at once, by the tacit consent, or at least by the sufferance, of the state, to erect its boomworks in and adjacent to the river, where it has ever since performed the functions of a boom company in accordance with its franchise. It thus appears that these premises were practically appropriated to public use by the petitioner some time before the respondent was incorporated, and consequently before it was entitled to the rights and privileges of a boom company on Samish river. After the petitioner had organized and filed its articles of incorporation, it became its duty to file with the secretary of state, within ninety days thereafter "a plat or survey of so much of the shore lines of the waters of the state and lands contiguous thereto" as it proposed to

appropriate for its corporate purposes. Bal. Code, § 4379. And by requiring the petitioner to make and file such plat the legislature, by necessary implication, granted it the privilege of selecting the location designated therein. It is true, petitioner did not perfect absolutely its right to occupy the lands it seeks to condemn by leasing or paying therefor before it took possession; but that was a matter of no concern to the respondent, prior to the time it became the purchaser thereof. Boom companies are organizations of a peculiar character. Their operations are necessarily restricted to the "waters of the state," and in some cases to a particular river or stream. But they certainly have as much discretion in selecting the location of their works as other corporations have, which have been given the right to exercise the power of eminent domain. And where such discretion is exercised in good faith by a corporation desiring to condemn land, it is generally held that it will not be interfered with by the courts. 10 Am. & Eng. Enc. Law (2d ed.), p. 1057, and cases cited.

It seems to be claimed, however, by respondent, that the fact that the petitioner has extended its works further down the river than they were at first is evidence of bad faith on its part. But we are of the opinion that that fact is not sufficient to establish bad faith, unless we concede—which we do not—that petitioner had no discretion whatever in the matter of selecting the location of its business. It is evident that, if the petitioner is entitled to any benefits or privileges at all by virtue of its franchise, it has at least the right to place the necessary appliances and to carry on its business, if practicable, in and on the Samish river (a part of the navigable waters of the state), without paying any one for such privilege. Of course, the state did not attempt to sell the water flowing in the river, or the land covered by it, and the respondent does not claim

to be the owner of either. It is, as we have seen, only certain shore lands that are here in controversy; and the question is whether the petitioner, on payment of a just compensation to the owner, may appropriate the premises for the purposes of its business as a boom company. It undoubtedly has the right to exercise the power of eminent domain, for that right was expressly delegated to it by the legislature. And the question whether a corporation having the power to condemn lands is authorized by our law of eminent domain to appropriate the property of another corporation which had already been devoted to public purposes was considered by this court in the recent case of *Seattle & M. R. R. Co. v. Bellingham Bay & E. R. R. Co.*, 29 Wash. 491 (69 Pac. 1107). In that case the Bellingham Bay & Eastern Railroad Company sought to condemn for its use as a right of way certain tide lands in front of the city of Fairhaven, owned by the Seattle & Montana Railroad Company. It appeared that the last-named company had purchased a larger tract of tide lands than it required for corporate purposes, and that it subsequently sold several parcels thereof for private purposes. It, however, reserved a strip 100 feet wide for its right of way. At the time of the hearing of the petition for condemnation it appeared that the Seattle & Montana Railroad Company had constructed only two spurs on this reservation, for trackage purposes, in connection with its station; but the proof tended to show that it contemplated the construction of at least four tracks thereon, and that it intended to construct them immediately. It was urged as a defense to the condemnation proceedings, as it is here, that the property sought to be appropriated was already devoted to public use, and therefore was not subject to be taken for another use of like nature. But the trial court

concluded that the premises in question were subject to condemnation by the petitioner, and this court, after a careful consideration of our statutes and numerous decisions of other courts, affirmed the judgment. And in the course of the opinion we said:

“But the general rule maintained by the petitioner [for a writ of review], and the authorities supporting the same, is not so applied as to prevent one railroad from taking the property which is not in use for railroad purposes, and not necessary for the corporate franchises.”

Some of the leading cases were there reviewed and quoted from, and we are fully satisfied with that decision. Among other cases announcing the same doctrine, and not specifically referred to in that opinion, is that of *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, 16 Mont. 504 (41 Pac. 232, 31 L. R. A. 298, 50 Am. St. Rep. 508), in which the question under consideration is ably and elaborately discussed by the supreme court of Montana.

It is further contended by the respondent that the petitioner has not in this instance shown any necessity for the taking of the particular lands which it seeks to appropriate, as it appears that there is other land available, although perhaps not so convenient for its purposes, and it is argued that the mere matter of convenience cannot be considered. It is true that the petitioner cannot condemn this property in the absence of any necessity therefor. But the word “necessity,” as used in the statute, “does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route [here another location], considered in connection with the relative cost to one, and probable injury to the other.” *Mobile & G. R. R. Co. v. Alabama M. Ry. Co.*, 87 Ala. 508 (6 South. 406), cited

and approved in *Seattle, etc., R. R. Co. v. Bellingham Bay, etc., R. R. Co.*, *supra*. Another learned court states the rule as follows:

"It may be observed generally that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite, and proper for the accomplishment of the end in view, under the particular circumstances of the case." *Butte, A. & P. Ry. Co. v. Montana U. Ry. Co.*, *supra*.

"It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work." *Postal Tel., etc., Co. v. Oregon Short Line R. R. Co.*, 23 Utah, 474 (65 Pac. 735); 10 Am. & Eng. Enc. Law (2d ed.), pp. 1057-8.

We think that, upon the facts and circumstances appearing in the case, the petitioner has shown a "reasonable" necessity for the condemnation of the land it seeks to appropriate. If, as respondent suggests, it would have been equally as convenient for petitioner to have selected some other place of business in the first instance, why may not the respondent now select, without special inconvenience, some other location for its business? It is evident that both of these corporations cannot carry on their corporate business at the same place at the same time. Both of them desire the same location, and in such cases the following is said to be the rule:

"When different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right." *Mills, Eminent Domain* (2d ed.), § 47.

It is contended, however, by the respondent, that, even if priority of location and occupation give priority of right, it can only be where they are made for the express pur-

pose of securing a permanent right; that the possession and occupation must be lawful; and that a company in possession adversely or as licensee cannot predicate any right on its priority; and *Minneapolis & St. L. Ry. Co. v. Minneapolis W. Ry. Co.*, 61 Minn. 502 (63 N. W. 1035), is cited in support of its contention. It appeared in that case that the plaintiff company had, with the consent of the owner, entered upon a so-called 33-foot strip of land, and constructed side tracks extending to certain mills and elevators owned by the Minneapolis Mill Company. It had used these tracks, together with certain extensions known as "trestle tracks," in its transportation business, for a considerable number of years, when the mill company sold the 33-foot strip and the trestle tracks, and the land on which they were situated, to the defendant company. The trestle tracks were built and owned by the mill company. After the Minneapolis Western Railway Company purchased the premises, it demanded possession of the same, which was refused, and it thereupon brought an action of ejectment to recover the possession of the 33-foot strip. Upon the trial the court found in favor of the plaintiff, and the judgment was affirmed by the supreme court. The defendant in the ejectment suit then sought to have the 33-foot strip and the trestle tracks condemned for its right of way. The trial court held that the plaintiff had not, under the laws of the state (Minnesota), the right to condemn the property, and the supreme court affirmed the ruling. It seems that the learned court was of the opinion in that case that the defendant company, which already owned and operated a line of railroad, desired and needed the land there in question for railroad purposes, and that the public use to which the plaintiff proposed to devote the premises was "identical with" that "already en-

joyed." And upon that state of facts the decision of the court was fully warranted by well-established principles of law, and for that reason is not, in our judgment, open to criticism. But we are not prepared to assent to the broad doctrine contended for by counsel for respondent, and apparently justified by some of the expressions of the court in that case, that a railroad company possessing the powers of eminent domain will be deprived of the right to exercise that power by reason of the fact that it has occupied and used the premises it desires to continue to use, under a revocable license from the owner, and without attempting to condemn the property until after the owner has sold it to another railroad company. It is doubtless true that a "claim of right to condemn" cannot be predicated solely upon wrongful possession, but it is also true that the right itself is not extinguished by such possession. The right to condemn property for public use is essentially a creature of the statute, and, when once given, can be taken away or destroyed, if at all, only by legislative enactment. But one corporation has no right to appropriate a particular tract of land owned by another corporation, and which has already been appropriated to public use, and is necessary for the corporate purposes of such owner. The right to condemn in any particular case will therefore depend upon the facts and circumstances appearing therein. And hence the decision in the Minnesota case on which counsel for the respondent so confidently relies must be read in the light of the facts before the court, and, when it is so read, we think it fails to support his contention. There the petitioner took possession of the land it sought to condemn, under a parol license which was subject to be revoked at any moment, without manifesting any desire or intention to secure permanent possession and occupancy

of the same; and these facts seem to have been deemed material by the court. Here the petitioner has at all times since its organization shown an intention to hold permanent possession of these lands. It claimed the right to occupy and use the premises, in the exercise of its franchise, as against the state itself, and even went so far as to attempt to enjoin the state land commissioner from executing the contract of sale to the respondent, under which it claims title to the premises. See *Samish Boom Co. v. Callvert*, 27 Wash. 611 (68 Pac. 367). But the most material facts found in the Minnesota case, as we understand it, which do not appear in the case at bar, have already been mentioned. They are these: The property there sought to be taken had already been devoted to railroad purposes by the defendant, and was necessary to the enjoyment of its franchise. And in view of such facts the ruling was certainly correct, regardless of all other matters of fact stated in the opinion of the court. Conceding that the petitioner in this case was technically a trespasser, by reason of the fact that it took and held possession of the land before it acquired any title or right thereto or therein by condemnation proceedings or otherwise, still it is not thereby precluded from resorting to the remedy given it by statute for the acquisition of the lands for corporate purposes and for public use. By thus prematurely entering upon the premises and excluding the owner therefrom, the petitioner rendered itself liable to an action of trespass or ejectment by the owner, but it did not forfeit the right with which it was clothed by the state to pursue the remedy by which its possession may be rendered rightful, and by which lawful title may be acquired. *Jones v. New Orleans & S. R. R. Co.*, 70 Ala. 227; *Secombe v. Railroad Co.*, 23 Wall. 108; *Justice v. Nesquehoning Valley R. R. Co.*,

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Syllabus.

87 Pa. St. 28; *Oregon Ry. & N. Co. v. Mosher*, 14 Ore. 523 (13 Pac. 302, 58 Am. Rep. 321); *Lyon v. Green Bay & M. Ry. Co.*, 42 Wis. 538. See, also, *Seattle & Montana R. R. Co. v. Corbett*, 22 Wash. 189 (60 Pac. 127); *Bellingham Bay & B. C. R. R. Co. v. Strand*, 14 Wash. 144 (44 Pac. 140).

It is conceded in the brief of counsel for the respondent that the petitioner has pursued the proper remedy in this instance, and we have therefore treated the application for the writ of certiorari as granted, and have directed our attention solely to the merits of the case presented by the record. And our conclusion is that the petitioner is entitled, under the law and the evidence, to the relief demanded. The order and judgment of the court below are therefore reversed, and the cause remanded, with directions to cause a jury to be summoned to ascertain and assess the damages which will result to the respondent by reason of the appropriation by petitioner of the lands described in the petition.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ.,
concur.

[No. 4582. Decided September 10, 1903.]

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FRED EIDEMILLER *et al.*, Appellants, v. S. M. ELDER *et al.*,
Respondents.

GARNISHMENT — ERRONEOUS JUDGMENT — INJUNCTION IMPROPER
REMEDY.

Injunction will not lie to restrain the enforcement of a judgment against garnishees, where the court had jurisdiction of the subject-matter and the parties, since the remedy of the garnishees, if a finding of indebtedness to the principal defendant

was not justified by the evidence, was the correction of such error by appeal.

SAME — MONEY JUDGMENT AGAINST GARNISHEE WHO DISPOSES OF PERSONAL PROPERTY.

The fact that garnishee defendants disposed of property of the principal defendant after the service of the writ of garnishment on them would not deprive the court of jurisdiction to make a finding of indebtedness to the principal defendant and enter judgment accordingly.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Affirmed.

Robert B. Lehman and *T. W. Hammond*, for appellants:

The court will enjoin enforcement of a void judgment in garnishment, especially where an execution regular on its face may be issued. *Missouri Pacific Ry. Co. v. Reid*, 34 Kan. 410.

A garnishment proceeding is purely statutory, in derogation of the common law, and the powers of the court are limited strictly to those conferred by the statute. 2 Wade, Attachments, § 333; Rood, Garnishments, § 6. A money judgment is authorized in garnishment under our statute only when it appears that the garnishee is indebted to the defendant. Bal. Code, § 5402; *Campbell v. Simpkins*, 10 Wash. 160. If it appears that the garnishee has property in his possession or under his control belonging to the defendant, a decree is to be entered requiring the garnishee to deliver it to the sheriff. And if he fails or refuses to deliver the property as so required, he may be punished for contempt of court. Bal. Code, §§ 5404, 5405. In this case it appears affirmatively from the findings of the court that the garnishee was not indebted to the defendant, but had property belonging to him. The

judgment [for the recovery of money] being thus in excess of the authority of the court was utterly void. *United States v. Walker*, 109 U. S. 267 (27 L. ed. 927). It is not enough to make this judgment merely erroneous that the court had jurisdiction of both the parties and the subject-matter of the proceeding, for the judgment of a court of competent jurisdiction is a nullity when rendered without authority of law. *Ritchie v. Sayers*, 100 Fed. 530. If the court be not engaged in the exercise of its inherent jurisdiction, but under a special power given by statute, its judgments in excess of that power are void. *Folger v. Columbian Ins. Co.*, 99 Mass. 267.

Ellis & Fletcher, for respondents:

A judgment cannot be reviewed by a bill in equity. *Forquer v. Forquer*, 19 Ill. 67. Equity will not interfere where there is a full and adequate remedy at law. *Bank of United States v. Moss*, 6 How. 30 (12 L. ed. 331); *Crist v. Cosby*, 69 Pac. 885; *State ex rel. Hibbard v. Superior Court*, 21 Wash. 631; *Schwab v. Madison*, 49 Ind. 329; *Holmes v. Rogers*, 13 Cal. 191; *Logan v. Hillegass*, 16 Cal. 201; *Sanchez v. Carriaga*, 31 Cal. 170; *Chezum v. Claypool*, 22 Wash. 498. The only question is, is this the judgment that the court intended to enter? Not whether it is right or wrong. Such a question could only arise upon an appeal. *Durning v. Burkhardt*, 34 Wis. 585; *Pinger v. Van Click*, 36 Wis. 141; *Duffey v. Houtz*, 105 Pa. St. 96; *Turner v. Christy*, 50 Mo. 145; *Milam County v. Robertson*, 45 Tex. 222; *Wooldridge v. Quinn*, 70 Mo. 370; *Pierson v. Benedict*, 48 Pac. 996; *Jones v. Driskill*, 94 Mo. 190; *Scott v. Pleasants*, 21 Ark. 364; *Kizer v. Caulfield*, 17 Wash. 417; *Boston National Bank v. Hammond*, 21 Wash. 158; *Mayo v. Ah Loy*, 32 Cal. 477.

The opinion of the court was delivered by

DUNBAR, J.—This suit is brought to enjoin the enforcement of a judgment rendered against appellants in garnishment proceedings. The case was tried in the court below and dismissed. Appellants appeal from a judgment dismissing the suit, and assign as error the action of the court in denying their motion for judgment on the pleadings, and in giving judgment dismissing the cause.

The original judgment was for \$125.10, and \$27.25 costs. The facts were tried to a jury, to which was submitted special findings; and the jury found, among other things, that said garnishee defendants were in possession of personal property belonging to the principal defendant, C. N. Edmiston, of the value of \$1,500. The court further found that said personal property so found to be in possession of the said garnishee defendants at the time of the service of the writ was, after the service of the writ of garnishment, and prior to said trial, disposed of by said garnishee defendants, and placed beyond their control; that the said garnishee defendants were not able at the time of the trial to produce said property, or to deliver the same to the sheriff for sale to satisfy plaintiffs' judgment against the principal defendant in the action; that the property found to be in the possession of the garnishee defendants at the time of the service of the writ of garnishment, and which had been placed by them beyond their control, was of the value of more than sufficient to pay plaintiffs' judgment; that it would be fruitless to order or decree said garnishee defendants to deliver up said property to the sheriff for sale to satisfy plaintiffs' judgment; and that the garnishee defendants, by their disposal of said property, had converted the same to their own use, and had thereby made themselves liable to the plaintiffs for the payment of plaintiffs' judgment against the prin-

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cipal defendant and entered judgment accordingly. It is the contention of the appellants that the court had jurisdiction only to the extent of entering judgment in a contempt proceeding against the garnishee defendants for refusing to deliver the property of the principal defendant to the sheriff, and that the judgment entered was absolutely void, and *Campbell v. Simpkins*, 10 Wash. 160 (38 Pac. 1039), is cited in support of this contention. But this was a case directly on appeal from a judgment where the only question at issue was whether or not the garnishee had in his possession personal property belonging to the defendant, and did not at all involve the questions arising in the case at bar. Here not only did the court find that the garnishees were indebted to the defendant, but that was probably the only reasonable finding that could have been made under the facts proven; for, if the garnishee defendants disposed of the property after the service of the writ upon them, they would, in effect, be indebted to the defendant, and a proceeding under § 5405 would be unavailing. It is not the intention of the law to allow a garnishee defendant to escape his responsibility by such methods. This view of the law is directly sustained by *Thayer v. Partridge*, 47 Vt. 423, and *Rasmussen v. McCabe*, 43 Wis. 471, and seems to us to be in accordance with the spirit and reason of the Code. In any event, the court had jurisdiction of the parties to the action and of the subject-matter, with power to enter judgment in the garnishment proceeding; and if the conclusion reached, that the garnishees were indebted to the defendant, was not justified by the evidence produced at the trial, that was an error which should have been corrected on appeal.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

[No. 4635. Decided September 10, 1903.]

C. W. JONES, *Respondent*, v. STEPHEN A. CALLVERT *et al.*,
Board of State Land Commissioners, Appellants.

PUBLIC LANDS — INCORPORATION IN INDIAN RESERVATION — EXECUTIVE ORDER.

Public lands of the general government may be made part of an Indian reservation by means of an executive proclamation of the president of the United States.

SAME — TIDE LANDS PATENTED TO INDIANS — TITLE OF STATE.

Under the Enabling Act (25 St. at Large, 676, § 4) for the admission of Washington into the union, requiring this state to disclaim all right and title to all lands lying within its limits owned or held by any Indian or Indian tribes, and under art. 17, § 2, of the state constitution, disclaiming title in all tide, swamp and overflowed lands patented by the United States, the state has no authority to sell tide lands within the limits of an Indian reservation and patented to individual members of the tribe prior to statehood.

Appeal from Superior Court, Snohomish County.—
Hon. JOHN C. DENNEY, Judge. Reversed

W. B. Stratton, Attorney General, for appellants.

B. E. Padgett, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The respondent made application to the commissioner of public lands to purchase the lands involved in this case. The application was rejected by the board of state land commissioners on the theory that the state had no authority to sell or dispose of said lands because they were within the boundaries of the Tulalip Indian reservation. The respondent appealed from the decision of the board to the superior court of Snohomish county, which reversed the ruling of the board of state land

commissioners, and held that the lands applied for were subject to sale by the state as prescribed by law, and judgment was entered accordingly. From this judgment the board of state land commissioners appealed.

It is conceded that the lands are within the boundaries of the above-named Indian reservation, but it is claimed by the respondent that they are not embraced in said reservation, excepting through executive order of the President. A patent for a portion of these lands was, on the 1st day of April, 1885, issued and delivered to Richard Lawrence, and on the 1st day of July, 1884, a patent for the remainder of the tract was issued and delivered to Jack Wheeler and his wife. It is true that this patent incorrectly stated the name of the wife of said Wheeler, and on account of said error the original patent was, during the year 1902, surrendered to the United States, and another patent, exactly like the original except as to the date and the name of Wheeler's wife, issued and delivered in its stead to said Wheeler and his wife, Nancy. But in substance the lands were patented lands prior to the formation of the state government. We are satisfied from the record that the lands applied for were strictly within the limits of the Indian reservation, but, even if this were not true, the law provides for the executive proclamation which was made in this case, and under such proclamation they are legally within the boundaries of said reservation.

A great deal of discussion has been indulged in upon questions which it seems to us have been settled by the decisions of this court. It may be conceded that at common law the title to lands which were overflowed by the tide was in the king for the benefit of the nation, and that, as a matter of history, upon the settlement of the colonies, the rights which were held for the benefit of the nation

passed to the colonies, or to the grantees of the charters granted by the king for the benefit of the communities to be established; that, when the colonists obtained their independence, the same rights were held by the government in trust for the states which were to be carved out of the general government, and that the same rule applies to the territory acquired by the United States government since its organization. This is the general and undoubted rule; but it is equally well established, we think, that the government may prescribe limitations upon the use and ownership of these lands, and, whatever may have been the decisions on this question—and they have been more or less conflicting—under the later cases of *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. 548), and *Mann v. Tacoma Land Co.*, 153 U. S. 273 (14 Sup. Ct. 822), the contention that the United States has no constitutional power to dispose of such lands under any circumstances does not obtain. But, even conceding that it did not have such power, such concession would not be available to respondent in this case, for the practical question occurs upon the right of the state to disclaim title to tide lands where that power has been exercised by the United States. We received admission into the Union of states by a compliance with the provisions of the act of Congress providing for our admission, which is termed the “Enabling Act.” Enabling Act, § 4, 25 St. at Large, 676, provides that:

“The people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands

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shall remain under the absolute jurisdiction and control of the Congress of the United States.”

This provision of the enabling act was incorporated verbatim in § 1 of article 26 of the state constitution, and became a part of the compact with the federal government under which the state was admitted to the Union. In addition to this, of their own accord, and for reasons which seemed equitable and just to the framers of the constitution, it was solemnly proclaimed in § 2 of article 17 of the constitution that the state of Washington disclaimed:

“All title in and claim to all tide, swamp and overflowed lands patented by the United States: provided, the same is not impeached for fraud.”

Under this disclaimer it would seem that no argument is necessary to justify the conclusion that the lands applied for here, which had been patented by the United States, and where there is no charge of fraud involved, cannot now be sold by the state authorities, and that the state authorities have no jurisdiction whatever over them so far as their title is concerned. It was held in *Scurry v. Jones*, 4 Wash 468 (30 Pac. 726), that the disclaimer by the state (Constitution, art. 17, § 2) of all title in and claim to all tide, swamp, and overflowed lands patented by the United States, while not in terms confirmatory of title so acquired, was substantially a grant to patentees of the interest of the state in such land. In discussing that proposition it was said:

“Under the law, as conceded by both parties, the lands had passed absolutely to the state, subject only to such clouds thereon as were caused by the same having been assumed to have been granted to private individuals by the United States. Under such circumstances, if the state disclaims all of its title to such lands, where the patents

had been obtained without fraud, it certainly was for the benefit of some one, and it clearly could not have been for the benefit of the United States. And as the state, in the section immediately preceding this, had asserted its title to all such lands, whether occupied or unoccupied, which had not been thus patented, it seems clear to us that the evident intent of the disclaimer was to ratify the action of the United States in the issuance of such patents. In our opinion, the interest of the state passed as fully to the grantees in such patents, or to those holding under them, as it would have done had there been express words of grant used in the constitution. Any other interpretation of the language used would deprive it of any beneficial force whatever."

Under both the letter and spirit of this decision, and of subsequent decisions of this court on the same subject, the judgment is reversed.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4651. Decided September 11, 1903.]

L. A. KENNEDY, *Appellant*, v. ROSE M. TRUMBLE, *Respondent*.

EXECUTION SALE — REDEMPTION — LIABILITY FOR RENTS OF FARMING LAND.

Although an execution purchaser of land is liable for the rents or value of the use and occupation to a redemptioner of the land, such purchaser could not be held for the value of the use of farming lands, the right of possession of which is especially conferred on the debtor during the period of redemption by Laws 1899, p. 92, § 15, where it appears that the purchaser had not been in possession nor received the benefit of the crops raised thereon.

SAME — ACTION FOR ACCOUNTING PRIOR TO REDEMPTION — LIMITATIONS.

An action against an execution purchaser of land for an accounting of rents with a view to redemption, brought more than

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a year after the sale, is in time, although the purchaser was not liable for any rents, where the purchaser did not comply with a demand for a sworn statement of the profits, and the action was brought within sixty days after demand therefor, as provided by Laws 1899, p. 91, §§ 12, 13.

SAME — SWORN STATEMENT OF RENTS NECESSARY.

The making of a statement of rents and profits received by the purchaser will not affect the extension of time given by the statute in case of a failure to make the statement demanded by the redemptioner, where the one made by the purchaser is not a sworn statement.

Appeal from Superior Court, Lincoln County.—Hon. CHARLES H. NEAL, Judge. Reversed.

Myers & Warren, for appellant.

Martin & Grant, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—It is, we think, a sufficient statement of this case to say that the respondent purchased the land in controversy on the 10th day of November, 1900, at sheriff's sale, she having had a lien upon said land for the sum of \$1,500 and certain costs. It is true, the court finds that said sale was made on the 10th day of October, 1900, but we think from the whole record in the case that this is a mistake, that the judgment was rendered on the 10th day of October, and that the sale was not made until the 10th day of November following. The judgment debtor, James Trumble, had deeded said land to appellant in June, 1900, and this action is a demand for an accounting of rents from respondent, with a view to redeeming said land under the provisions of chapter 53, of Laws of 1899, p. 85, it being claimed by the appellant that the respondent was obligated to him for the rental value of the land during the period between the purchase and the redemption. The statute (Laws 1899, p. 92, § 13) provides that "the

purchaser, from the time of the sale until the redemption, and the redemptioner, from the time of his redemption until another redemption [with certain exceptions], is entitled to receive from the tenant in possession the rents of the property sold, or the value of the use and occupation thereof," and, in effect, that such rents or profits shall be a credit upon the redemption money to be paid. It is, however, provided by the law in § 15 that, as to any land so sold which is at the time of sale used for farming purposes, or which is a part of a farm used at the time of the sale for farming purposes, the judgment debtor shall be entitled to retain possession thereof during the period of redemption. It appears from the testimony in this case that this was farming land, and that the respondent was not in possession of the land during the year succeeding the sale and did not receive the benefits of the crops raised thereon. It is contended by the appellant that she had a right to such benefits, and is therefore responsible to him for the value of the rental whether she received it or not. But we do not take this view of the law, and, from the testimony, are satisfied with the finding of the court in respect to the rent.

The only question left, then, is whether or not the time for redemption had expired before the commencement of this action by the appellant; the respondent claiming that, if it eventuated that she was not bounden to the appellant for the rents, the statute of limitations had run against the right of the appellant to redeem. The court took this view of the law, and found, both as a fact and a conclusion of law, that the land was not redeemed within the time required by law. Plaintiff's action was therefore dismissed, and the respondent was decreed to be the sole and separate owner of the premises. The mode of redeeming

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pointed out by the statute is as follows: The person seeking to redeem shall give the sheriff at least five days' written notice of his intention to apply to the sheriff for that purpose. It shall be the duty of the sheriff to notify the purchaser or redemptioner, as the case may be, or his attorney, of the receipt of such notice; and, under the provision above referred to in relation to the rents and profits being credited upon the redemption money, if the redemptioner files with the sheriff a demand in writing for a written and verified statement of the amount of such rents and profits thus received and expenses paid and incurred, the period for redemption is extended five days after such sworn statement is given. If such person shall, for a period of ten days after such demand has been given to the sheriff, fail or refuse to give such statement, such redemptioner or other person entitled to redeem from such sale making such demand may bring an action within sixty days after making such demand in any court of competent jurisdiction, to compel an accounting and disclosure of such rents, profits, and expenses; and until fifteen days from and after the final determination of such action the right of redemption is extended to such redemptioner. It appears from the finding of the court in this case, although the testimony in that regard is not very satisfactory, that this demand was made by the appellant upon the respondent on the 1st day of October, 1901. In this connection it may be here stated that this renders immaterial the question of whether the sale was made to the respondent on the 10th of October, 1900, or the 10th of November following, for, if on the 10th of October, 1900, as found by the court, the demand filed on the 1st day of October, 1901, would be sufficient to avoid the statute of limitations. It is contended by the appellant that the answer provided by the statute was given and a statement pur-

porting to be such an answer was introduced and filed as an exhibit in the case; while the respondent as stoutly asserts that such answering statement was not given in response to the demand of the appellant. If the contention of the appellant were true that such statement was given in response to the demand, this action could not be maintained, because the statute provides that if, in response to such demand, a sworn statement is given by the purchaser or other person receiving such rents and profits, and such redemptioner or other person entitled to redeem or make such demand desires to contest the correctness of the same, he must first redeem in accordance with such sworn statement, and, if he desires to bring an action for an accounting thereafter, he may do so within thirty days after such redemption. But an examination of the statement furnished by the respondent shows that it does not comply with the requirements of the statute, in that it is not a sworn statement, or does not appear to be from the statement of facts on file. The statement prescribed by the law then not having been furnished, the redemptioner had the right to pursue the remedy which he is pursuing for the purpose of determining the amount necessary to pay for the redemption of the land.

For the error of the court in this respect the judgment will have to be reversed, and the appellant allowed to redeem, if he sees fit to do so, by paying the whole amount of the judgment and costs now standing against the land, the finding in relation to the rent being affirmed.

FULLERTON, C. J., and MOUNT, ANDERS and HADLEY JJ., concur.

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[No. 4692. Decided September 11, 1903.]

M. C. SIMMONS *et al.*, Appellants, v. J. M. JAMIESON,
Respondent.

EJECTMENT — EVIDENCE — LOCATION OF LOST MEANDER CORNER.

The testimony of a surveyor in a contest over a disputed boundary line is competent and relevant, when it appears that the witness followed one of the recognized rules for restoring lost meander corners in attempting to locate the boundaries of two overlapping claims.

SAME — FORM OF VERDICT.

In an action of ejectment, where defendant admits that plaintiff is the owner of the land described in the complaint and denies that defendant is in the possession and use thereof, a general verdict in favor of defendant would not be erroneous, since the provisions of Bal. Code, § 5510, prescribing that if the verdict be for defendant in ejectment, the jury shall find that the plaintiff is not entitled to the possession of the property, would be inapplicable to the circumstances of the case.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Affirmed.

Troy & Falknor, for appellants.

George C. Israel, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This is an action in ejectment and for damages. Plaintiffs allege in their complaint that they are the owners and in possession of an irregular tract of tide land described in section 11, township 18 north, of range 3 W., W. M., in Thurston county, on Eld inlet; that the defendant unlawfully took possession of a part of said land, and is using the same for rolling and booming logs thereon, to plaintiffs' damage. The defendant's answer admits that plaintiffs are the owners of the land described in the com-

plaint, and denies all the other allegations of the complaint. The case was tried before a jury, which returned a verdict in favor of the defendant. Plaintiffs appeal from a judgment entered on the verdict.

The facts in the case are substantially as follows: Appellants are entitled to possession of a tract of tide land commonly known as the "Simmons tract" on Eld inlet. Respondent is the owner of a tract of tide land known as the "Walker tract," lying immediately to the north of appellants' land. Both tracts were sold by the state, which originally owned the whole thereof. The Walker tract was a prior sale. When the Simmons tract was sold, the southern boundary of the Walker tract was made the northern boundary of the Simmons tract. At the trial the only question of fact in the case was the location of the boundary between these two pieces of land. Plaintiffs claimed that a log boom and roll way operated by defendant were south of the Walker tract and on plaintiffs' land, while defendant claimed they were not. The whole controversy turned on the location of the meander corner between sections 2 and 11, township 18 north, range 3 W., W. M., as the same was originally established by the government survey in 1856. It was not disputed at the trial that the post or monument marking this corner was lost, but plaintiffs and their witnesses testified that there was evidence of one of the original bearing trees, from which the location of the corner could be determined, and from which the measurements described in the deed from the state of the Walker tract made the south line of the Walker tract about 300 feet north of where defendant claimed it was; while defendant and his witnesses claimed the meander corner was further south than the place fixed by plaintiffs. This was the whole of the controversy. Some twenty-

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five assignments of error are made by appellants. Many of these assignments are without foundation, and, if error, were harmless. We shall examine only those which appear to us to be relied upon.

During the trial appellants moved the court to strike out all the evidence on the part of the respondent given by the witness L. M. Rice, which motion the court denied. Based upon this same ruling, the court also denied a motion for a directed verdict, and overruled a motion for a new trial, and errors are assigned upon all these rulings. The witness Rice was a surveyor, and testified, in substance, that he began his survey at the section corner between sections 11 and 12, township 18 north, of range 3 W., W. M., which is a known corner; that he ran out the meander line according to the field notes of the government survey; and that, according to his measurement, the meander corner at the initial point of the Walker tract was some 300 feet south of where the plaintiffs' witnesses placed it. He also testified that he started his survey from the initial point of the Simmons tract, and, following out the description of that tract, it would overlap the Walker tract about 130 feet; that he did not survey the Walker tract. There was much other evidence given by him upon these lines. It is argued by appellants that all this evidence was irrelevant and immaterial, because Mr. Rice failed to do those things which a surveyor is required to do in order to find a lost corner, and that he observed none of the well established rules of surveying. From an examination of the authorities cited we are convinced that the witness followed one of the rules laid down by Bellows & Hodgman at page 333 in their "Manual of Land Surveying," which is recognized among surveyors as a standard authority, as follows:

“Lost meander corners are to be restored by running the line from the nearest known corner the direction and distance called for by the notes of the original survey.”

See, also, *Bryan v. Beckley*, 12 Am. Dec. 276; *Billingsley v. Bates*, 30 Ala. 376 (68 Am. Dec. 126); *Lewis v. Prien*, 98 Wis. 87 (73 N. W. 654). Such being one of the rules for establishing lost corners, the evidence given by Rice was material for the purpose, and proper for the jury to consider, and it was, therefore, not error for the court to refuse to strike it out. For the same reason it was not error to deny the motion for a directed verdict and the motion for a new trial upon the same ground.

Appellants argue that the motion for a new trial should have been granted because the verdict does not comply with § 5510, Bal. Code, and is therefore invalid. The verdict, omitting the formal parts, is as follows:

“We, the jury, duly empaneled in the above entitled cause, say that we find for the defendant.

“R. P. Shoecraft, Foreman.”

The statute (§ 5510) is as follows:

“The jury by their verdict shall find as follows: . . .
2. If the verdict be for the defendant, that the plaintiff is not entitled to the possession of the property described in the complaint, or to such part thereof as the defendant defends for, and the estate in such property, or part thereof, or license, or right to the possession of either, established on the trial by the defendant, if any, in effect as the same is required to be pleaded.”

This statute cannot apply to this case, because the answer of the defendant admits that the plaintiffs are entitled to the possession of the land described in the complaint. It denies that the defendant was in possession of any of it. The dispute was directed to the location of the boundary line. Since the answer admits that the

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plaintiffs are the owners and in possession of all the land described in the complaint, the jury, upon the trial, which involved only the location of the boundary, could not say by their verdict "*that the plaintiff is not entitled to the possession of the property described in the complaint,*" without contradicting a fact admitted by the pleadings. The statute, therefore, does not apply to a case of this kind. The general verdict was sufficient.

The errors above discussed appear to be the principal ones relied upon. Numerous others are assigned upon the instructions. We have examined all of them, and find that the instructions given were full, and fairly stated the law to the jury. There was no error in the trial. The judgment is therefore affirmed.

FULLERTON, C. J., and ANDERS, HADLEY and DUNBAR, JJ., concur.

[No. 4581. Decided September 12, 1903.]

AGNES W. MARSH, *Appellant*, v. MARY E. MARSH, *Respondent*.

CONVEYANCES — CONSIDERATION—LOVE AND AFFECTION.

The transfer by a son to his mother for a nominal consideration of his interest as heir in his father's portion of the community estate would be valid as against a subsequent assignee of such interest, where mother and son both testify as to the absence of fraudulent representations in procuring the conveyance to the mother, and state facts showing that it was actually made in consideration of love and affection.

Appeal from Superior Court, Spokane County.—Hon. GEORGE W. BELT, Judge. Affirmed.

S. S. Bassett, Joseph Rice and James Hopkins, for appellant.

Scott & Rosslow, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant, Agnes W. Marsh, brought this action against respondent, Mary E. Marsh, and asked that a deed to certain real estate and an assignment of certain mining stock should be declared void, as having been made and delivered to respondent without consideration, and by reason of her fraudulent misrepresentations. Respondent was made a defendant in her individual capacity, and also as administratrix of the estate of her deceased husband, Erasmus Marsh. Alfred C. Marsh is the son and only living child of said Erasmus and Mary E. Marsh, and, as such, inherited the interest of his deceased father in the community estate held by the father and mother at the time of the death of the former. Appellant, Agnes W. Marsh, was formerly the wife of said Alfred C. Marsh, but had been divorced prior to the bringing of this suit. Some time after the death of Erasmus Marsh, said Alfred C. Marsh, together with appellant, as his then wife, executed a deed, by which he conveyed to respondent his interest in the farm that had long been occupied by respondent and her said husband as a home. Said Alfred C. Marsh also assigned to respondent all his interest in certain mining stock, some of which he had theretofore held individually, and some of which came to him from his father's estate, as aforesaid. Subsequently, appellant procured her said divorce from Alfred C. Marsh, and some time after the divorce her said former husband assigned to her all of his interest in the estate of his deceased father. As such assignee, appellant brought this suit, and alleged that the conveyance of the real estate and mining stock to respondent, as aforesaid, was procured upon respondent's representation that such transfers were necessary to

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save expenses of administration, and that no consideration passed for said transfers. It is also alleged that, before bringing suit, appellant demanded of respondent that she transfer to her the interest in said land and stock previously conveyed to respondent, as aforesaid, which demand was refused. The answer admits the transfers to respondent, but denies the averments as to fraud and as to want of consideration. It is also affirmatively averred that the assignment from Alfred C. Marsh to appellant was without consideration, and was procured by reason of a conspiracy between appellant and her counsel, and that false representations were made to said Alfred C. Marsh by appellant and her counsel, to the effect that respondent, by a will which she had executed, had practically disinherited her said son, and had left him but \$10 of her estate; that said statements were false, and were made with the intent to deceive said Alfred C. Marsh, and to poison his mind against respondent; that he believed the same, and, relying upon them, was deceived thereby, and induced to make said assignment. It is further averred that at the same time appellant and her counsel agreed that if he would make said transfer to appellant, then the three—appellant, her counsel, and said Alfred C. Marsh, would divide equally the proceeds of what they might obtain by reason of bringing suit against respondent to avoid the transfers made to her, as aforesaid. The cause was tried by the court without a jury, and resulted in a judgment dismissing appellant's complaint, and that she is estopped from claiming any interest in said real estate or in said mining stock. She has appealed from the judgment.

Several assignments of error are not discussed in the brief. The discussion is directed to the findings of

facts and conclusions of law entered by the court. The testimony of Alfred C. Marsh supports that of his mother, the respondent, that the real estate was transferred to her because of his desire that she should hold and enjoy the home and farm which she had by many years' work assisted his father to procure; that such was the sole purpose of making the conveyance; and that no fraudulent representations were made to induce such transfer. The deed stated a consideration of \$10, and the evidence shows that the mother handed her son \$20 at the time the deed was delivered. The land was valuable, and the amount of money then paid could have been no more than a nominal consideration. We think the evidence shows, however, that the money paid was not intended as a consideration, but merely as a voluntary gift from the mother to the son, and that the real consideration intended was love and affection between mother and son. The court found that no false representations were made by respondent to induce the making of such conveyance, and that the same was made voluntarily and without any reservation whatever. We think the finding is sufficiently sustained by the evidence, and should not be disturbed.

The court also found that the mining stock was transferred to respondent for a money consideration, which was paid by her, and that the same was made fairly and openly, without any false representations to induce it. The stock transfer included some which was held by Alfred C. Marsh individually, and also his interest in what belonged to his father's estate. The evidence shows that sums aggregating several thousand dollars were paid by the mother to the son at different times. She places the full amount as high as \$7,000, but whether that sum was paid or not, it at least appears with sufficient clearness

that several thousand dollars were paid, and that such payments were intended as the consideration for the transfer of the stock, including that which came from the father's estate. The finding of the court upon this subject will therefore not be disturbed.

It was also found that the alleged assignment to appellant was made, but that the same was made after the said transfers to respondent. It was further found that the transfer to appellant was induced by false and fraudulent representations made to Alfred C. Marsh by appellant and her counsel. It seems to us unnecessary to review the evidence upon the last-named subject, since it would appear to be immaterial, it having been found that the transfers made by Alfred C. Marsh to respondent were valid and absolute. The subsequent attempt to transfer the same property to appellant carried no interest therein to appellant upon which she can base her demand in this suit. It is therefore immaterial what may have been the inducements, if any, which were offered to Alfred C. Marsh to make the attempted transfer to the appellant.

We find no reversible error, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4665. Decided September 12, 1903.]

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SEWALL SANDERS, *Appellant*, v. STIMSON MILL COMPANY,
Respondent.

MASTER AND SERVANT — INJURY OF SERVANT — NEGLIGENCE — SUFFICIENCY OF EVIDENCE.

In an action for damages for injuries received from the accidental discharge of a gun which defendant was alleged to have

permitted a party of hunters to bring aboard a tugboat as passengers, the dismissal of the action was not error, when there was no testimony showing that the gun belonged to or was brought upon the boat by any of the hunters, or to whom it in fact belonged, or in what manner it had been discharged.

SAME—INJURY TO SEAMAN—LIABILITY OF SHIP FOR EXPENSE OF CURE.

A seaman who receives an injury while in the service of the ship is, under maritime law, entitled to medical care, medicine, and nursing necessary in effecting a cure, at the expense of the ship, and in an action against the owner therefor, he is entitled to recover the amount expended, whether or not the owner's negligence be proven, and regardless of whether he was nursed aboard ship or at his own home.

Appeal from Superior Court, King County.—Hon. GEORGE E. MORRIS, Judge. Reversed.

Scott Calhoun, John E. Humphries and Harrison Bostwick, for appellant:

While the appellant would have the right to libel the vessel, or to bring an admiralty suit *in personam*, yet the judiciary act reserves to him the right to bring an action in the state court. The national constitution and laws have not vested exclusive jurisdiction of actions like the case at bar in federal courts, therefore it may be maintained in the state court. *Claflin v. Houseman*, 93 U. S. 130 (23 L. ed. 833); *Calvin v. Huntley*, 59 N. E. 435; *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415; *Leon v. Galceran*, 11 Wall. 185 (20 L. ed. 74).

The right of seamen to be cured of sickness or any injury received in the ship's service, at the expense of the ship, is a rule regarded in the maritime law as forming part of the contract. *Temple v. Turner*, 123 Mass. 125; *Peterson v. The Chandos*, 4 Fed. 645; *The City of Alexandria*, 17 Fed. 396.

The respondent violated the United States navigation

laws in taking guns, ammunition and hunting parties upon the boat, and was therefore guilty of negligence *per se*. The violation of a statute which contributes to plaintiff's injuries is *prima facie* evidence of negligence. *Maxwell v. Durkin*, 86 Ill. App. 257; *Toledo, P. & W. Ry. Co. v. Deacon*, 63 Ill. 91; *McRickard v. Flint*, 114 N. Y. 226; *Knupfle v. Knickerbocker Ice Co.*, 84 N. Y. 488; *Siemers v. Eisen*, 54 Cal. 418; *Platte & Denver C. & M. Co. v. Dowell*, 17 Colo. 376; *Western & Atlantic R. R. Co. v. Young*, 81 Ga. 397; *Pennsylvania Co. v. Horton*, 132 Ind. 189; *Correll v. Burlington, C. R. & M. R. R. Co.*, 38 Iowa, 120; *Dahlstrom v. St. Louis, I. M. & S. R. R. Co.*, 108 Mo. 525; *Queen v. Dayton Coal & I. Co.*, 95 Tenn. 458 (30 L. R. A. 82); *Smith v. Milwaukee Builders' & Traders' Exchange*, 64 N. W. 1041 (30 L. R. A. 504). "The general rule is, that whether or not a given result is a natural and proximate consequence of a particular act is a question of fact for the jury. This applies without exception to cases where the particular act constitutes a violation of a statute." *Hoppe v. Chicago, M. & St. P. Ry. Co.*, 61 Wis. 357; *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 241 (28 L. ed. 410); *Selleck v. Lake Shore & M. S. Ry. Co.*, 93 Mich. 375; *Binford v. Johnston*, 42 Am. Rep. 508; *Eskildsen v. Seattle*, 29 Wash. 583 (70 Pac. 64).

As to rules governing master and seaman see *Thompson v. Hermann*, 47 Wis. 602; *Anderson v. New York, etc., Steamship Co.*, 39 N. Y. Supp. 425; *Eldridge v. Atlas Steamship Co.*, 134 N. Y. 187.

Root, Palmer & Brown, for respondent:

The taking of these sportsmen and guns upon the tug-boat was not an illegal act. Gould & Tucker's Notes on

Revised Statutes, Vol. 2, p. 545; *United States v. Guess*, 48 Fed. 587; *The Morning Star*, 17 Fed. Cas. No. 9817; *The Joshua Leviness*, 13 Fed. Cas. No. 7549; *Eastern Transportation Line v. Cooper*, 99 U. S. 78 (25 L. ed. 382). The violation of a statute does not constitute negligence as to one for whose protection the provision was not intended.

The opinion of the court was delivered by

DUNBAR, J.—This is an action brought by the appellant against the respondent to recover damages for injuries sustained by appellant while engineer upon the steam tug "Tillicum," owned by respondent, the allegations of the complaint being that respondent unlawfully permitted a party of hunters to go upon the boat; that while there they negligently discharged guns and firearms upon the boat, by which appellant was shot in the legs by the discharge of a shot from a shotgun brought on the boat by one of the hunters, to his damage as alleged. The answer put in issue the material allegations of the complaint. At the conclusion of plaintiff's testimony the case was taken from the jury, and judgment rendered in favor of respondent and against appellant for costs, and dismissing the case.

There are two assignments of error: (1) The action of the court in sustaining the motion of respondent for judgment against the appellant, dismissing the case, and rendering judgment against appellant for costs; (2) in sustaining the motion of respondent to the sufficiency of the testimony of appellant. The testimony was to the effect that a party of three men, with shotguns, came on board the tug at Seattle, and that after the tug had proceeded a short distance the men commenced to shoot. The appellant, who was the engineer of the tug, went upon

the deck, and, after he had been there about a minute, a gun, which he presumed was standing against the side of the boat, fell, and in falling was discharged. The shot with which the gun was loaded entered the legs of appellant, causing the damage of which he complains.

It is unnecessary to discuss the questions which seem to have occupied the lower court, viz., as to whether or not it was unlawful for the tug to carry passengers, by reason of its not having been licensed so to do, and whether the men who were traveling upon this boat were passengers, within the meaning of the license laws regulating the carriage of passengers on boats. For there is absolutely no testimony in the case showing that the gun which produced the injury belonged to, or was brought upon the boat by, one of the alleged passengers, or in what manner it was discharged, or whose gun it was. The following excerpt from the cross-examination of the appellant shows substantially all the evidence upon this subject:

“Q. What were the others shooting at at that time? A. Nothing. Q. Did they do any shooting while the boat was standing there? A. No, sir. Q. Where was the gun that was discharged and shot you? A. It was setting forward somewhere, I understand. I didn't see the gun at all. Q. Let me refresh your memory. Didn't you see the gun just as it was falling. A. No, sir. Q. Didn't you have some talk with Mr. Charles afterwards and say that you saw it just as it was falling? A. No, sir. I didn't see the gun as it was falling at all. Q. And you didn't know anything about it until it was discharged? A. I didn't know anything about it until it was discharged. Q. Whose gun was it that was discharged? A. No, sir. I don't know. Q. You don't know whether it belonged to Mr. Charles or not? A. No, sir. Q. You don't know whether it belonged to the Stimson Mill Company or not? A. No, sir. Q. You don't

know anything about it? A. I don't know who it belonged to. Q. Do you know who put that gun into the bow of the boat? A. I do not."

So that it will be seen there was no proof that the admission of these hunters to the tug was the cause, proximate or remote, of the accident which occurred. We think the question of damages, so far as the result of the injury was concerned, was properly withdrawn from the jury.

But it is stoutly maintained by the appellant that, under the maritime law, a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance, and to a cure, so far as is possible, at the expense of the ship, regardless of whether or not the condition of the seaman is brought about by the negligence of the owners of the ship, or is the result of disease or accident. This contention is, we think, sustained by the authorities, but it does not go beyond expenses incurred in getting well. The appellant avers that by reason of said injuries he has incurred heavy expenses in employing a physician and surgeon to attend said injuries, and for medicine, amounting in all to the sum of \$250 over and above the \$10,000 damages claimed for the injury. This amount, if proven, we think the appellant is entitled to. It is true that many of the cases cited by the appellant are where the medical attendance was on shipboard, but it has been frequently decided that it makes no difference whether the medical attendance was on board the ship, or whether the party requiring the attendance had been removed to some other place. In *Whitney v. Olsen*, 108 Fed. 292, it is said:

"Under the maritime law it is well settled that a seaman who receives an injury while in the service of the ship is entitled to medical care, nursing, and attendance,

and to a cure, so far as cure is possible, at the expense of the ship.”

And it is well settled that the action may be brought either in the federal or state courts.

It was decided in *The A. Heaton*, 43 Fed. 592, that the right was grounded upon the benefit which the ship derived from the service of the sailor, having no regard to the question of whether his injury had been caused by the fault of others or by mere accident; that it did not extend to compensation or allowance for the effects of the injury, but was in the nature of an additional privilege, and not of a substitute for, or a restriction of, other rights and remedies; and that it did not, therefore, displace or affect the right of the seaman to recover against his master or owners for injuries by their unlawful or negligent acts—citing many cases to sustain the announcement. See, also, *Leon v. Galceran*, 11 Wall. 185; *Whitney v. Olsen*, *supra*; *The Iroquois*, 113 Fed. 965; *Scarff v. Metcalf*, 107 N. Y. 211 (13 N. E. 796, 1 Am. St. Rep. 807); *Holt v. Cummings*, 102 Pa. St. 212 (48 Am. Rep. 199).

The last case cited is exactly in point. It was decided there that the engineer of a tug boat employed in the Delaware river was engaged in a maritime service, and was entitled to the rights and benefits conferred on seamen by the maritime law; that one of such benefits was the right to receive medical attendance and medicine at the cost of the vessel when sick or injured during his service; and that such right was not taken away or limited by the United States statutes (Rev. St. U. S., §§ 4585, 4803), providing for the collection from vessels of forty cents per month for each seaman as a fund for the relief of sick and disabled seamen, and appropriated

for the expenses of the marine hospital service; that said acts afford an auxiliary resource for sick or disabled seamen. It is true that in this case the action was brought by the physician who waited upon the engineer, but the reasoning and decision of the court will apply equally to an action brought by the engineer himself. This, also, was a case where the services were performed at the home of the engineer.

It is not necessary to discuss the question whether the right to these services could be lost to the seaman by reason of contributory negligence, for there is no indication of contributory negligence in this case. While it is true that the engineer would not probably have received the damages which he sustained if he had remained in the engine room, yet it was his right, according to the testimony, to go upon the deck of the tug, where he was when he received the injury.

The judgment will be reversed, and the appellant allowed to prove the amount of expenses incurred in employing a physician and surgeon, and for medicine and attentions necessary to his proper treatment.

FULLERTON, C. J., and ANDERS, HADLEY and MOUNT, JJ., concur.

[No. 4517. Decided September 14, 1903.]

ELIZA F. KING, *Appellant*, v. WILLIAM H. BRANSCHIED,
Respondent.

APPEAL — SUCCESSIVE APPEALS.

A second appeal may be taken by an appellant, without the necessity of having his original appeal dismissed.

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SAME — SUFFICIENCY OF APPEAL BOND.

The requirement of Bal. Code, § 6506, to the effect, that the appeal bond shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal or on the dismissal thereof, is sufficiently complied with where the appeal bond is conditioned that plaintiff will satisfy the judgment in case of affirmance, and any order which the supreme court may make, or order to be rendered by the superior court.

SAME.

Such a bond, though conditioned principally as a stay bond, is effectual as an appeal bond also, where it is in a penalty double the amount of the judgment and \$200 additional.

LIS PENDENS — SUIT TO REMOVE CLOUD.

Under Bal. Code, § 5521, which provides that any person in possession of real property may maintain a civil action against any person claiming an interest in said property, or any right thereto adverse to him, for the purpose of determining such claim, a suit to remove the cloud caused by the filing of a *lis pendens* notice in an action between other parties may be maintained by the owner, without awaiting the result of the action to which he is a stranger.

SAME — CANCELLATION OF RECORD.

Bal. Code, § 4887, which provides that in actions affecting title to real estate, where a *lis pendens* is filed, the court may, at any time after the action is settled, discontinued, or abated, order the notice canceled of record, on application of any person aggrieved, is cumulative of the remedy provided by Id., § 5521, in so far as it is applicable to persons not parties to the action in which the notice was filed.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge. Reversed.

F. S. Blattner, for appellant.

Ellis & Fletcher, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—The complaint in this action alleges that the plaintiff is the owner and in possession of certain real

estate, therein described, situated in Pierce county, state of Washington; that on the 7th day of March, 1901, the defendant caused to be filed in the office of the auditor of said county a *lis pendens* which described the real estate of which plaintiff claimed to be the owner; that defendant's *lis pendens* constituted a cloud on plaintiff's title, and obstructed the sale and transfer of said property; that defendant claimed an interest and right in said real estate adverse to plaintiff, and that defendant had no legal or equitable claim, interest, right, or title to said property, or any part thereof; prayed that the court determine such adverse claim made by defendant, that on such determination the defendant be declared to have no right, title, claim, or interest in or to said property, and that the *lis pendens* be canceled of record, and for judgment against the defendant for costs. The defendant interposed a demurrer to the complaint, to the effect that it did not state a cause of action, which demurrer was sustained. The plaintiff electing to stand on her complaint, judgment was entered for costs, and from such judgment this appeal is taken.

Respondent moves to dismiss the appeal for the reasons (1) that the brief fails to point out clearly or otherwise the errors complained of; (2) that the brief does not contain a sufficient statement of the case; (3) that the appellant did not, at or before or within five days after giving the notice of appeal, file with the clerk of the superior court an appeal bond to make her said appeal effectual, as prescribed by law. As to the first two propositions, the brief of appellant, though not lengthy, is clear and concise, and sufficiently states the points to be considered by this court. As to the third, it appears that appellant abandoned her first notice of appeal, and afterwards ap-

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pealed by giving a new notice and perfecting the appeal within ninety days from the rendition of the judgment. This court has frequently held that the taking of the second appeal is allowable, and it is not necessary that the first appeal should be dismissed. If it is not an effectual appeal, it is dismissed by operation of law. It is also contended by the respondent that the phraseology of the bond is insufficient under the statute, and that it is not in form or substance such as to render the appeal effectual. Section 6506, Bal. Code, provides that the bond shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal or on the dismissal thereof, not exceeding \$200. The condition of the bond in question is as follows:

“Now, therefore, if the said Eliza F. King shall satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may order or make, or order to be rendered or made, by the superior court, then this bond to be void and of no effect; otherwise to remain in full force and effect.”

While the exact language of the statute is not employed in the bond, we think the language used is sufficiently comprehensive, and covers in meaning the requirements of the statute, and that, if the appellant satisfies and performs the judgment or order appealed from, and any judgment or order which this court may order or make, or order to be rendered or made by the superior court, the respondent will receive all at the hands of the appellant which he is entitled to. It is also objected that the appeal bond, though in double the amount of the judgment and \$200 added, is not conditioned as an appeal bond, but merely contains the conditions of a stay bond, and that it is ineffectual in that respect; and *Hewitt v. Lansdale*, 26 Wash. 615 (67 Pac. 354), *Beezley v. Sessions*, 22

Wash. 125 (60 Pac. 130), *Graham v. American Surety Co.*, 28 Wash. 735 (69 Pac. 365), and *Loy v. Coey*, 31 Wash. 684 (71 Pac. 552), in addition to the authorities originally cited by respondent, are cited to sustain this contention. As we view these authorities, however, they are in no wise in point, but simply sustain the doctrine laid down in *Pierce v. Willeby*, 20 Wash. 129 (54 Pac. 999), wherein the rule was announced that, where the bond purported to be both a stay and an appeal bond, it must be in an amount twice the value of the judgment, in addition to the \$200 required on appeal. We think that the bond is sufficient, and the motion to dismiss must be denied.

On the merits it is contended by the respondent—a view evidently taken by the trial court—that the owner of the property must await the determination of the issues involved in the case in which the *lis pendens* was filed, and that there is no provision of law for the commencement of such an action as the one presented here. The appellant contends that the action is properly brought under the provisions of § 5521, Bal. Code, which provides that any person in possession of real property may maintain a civil action against any person claiming an interest in said property, or any part thereof, or any right thereto, adverse to him, for the purpose of determining such claim. We think this statute is sufficiently comprehensive to warrant the bringing of an action of this kind, even if it should be conceded that the plaintiff did not have a common-law right of action to remove a cloud from his title. That the filing of a *lis pendens* does constitute a cloud on title to real estate can scarcely be denied. It is urged by the respondent that the *lis pendens* is simply a part of, or an adjunct to, the original suit, but it is a part or an adjunct

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which certainly interferes essentially with the free use and enjoyment of one's property. The allegation of the complaint is that it does so interfere, and the legal effect of the filing of a *lis pendens* insures such a result, even though it were not alleged in the complaint. As between the parties to the original action, this action probably could not be maintained, for it would be but a trial between the same parties of the same issues which were presented in the original case. But we see no reason why a person who is not a party to the action should have to await the legal determination of the rights of strangers before he can be restored to the enjoyment of his own. The respondent insists that provision is made in § 4887, Bal. Code, for the determination of appellant's rights, it being there provided that in actions affecting title to real estate, where a *lis pendens* is filed, the court in which the said action was commenced may, at its discretion, at any time after the action is settled, discontinued, or abated, on application of any person aggrieved and on good cause shown, and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded. But this provision, if not intended to apply to the litigants or parties to the original action, would be a right cumulative to the appellant if he saw fit to await the determination of the original cause.

We think the complaint states a cause of action and that the court erred in sustaining the demurrer thereto. The judgment is therefore reversed, and the cause remanded, with instructions to overrule the demurrer to the complaint.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

[No. 4591. Decided September 14, 1903.]

CALDONIE BAILEY, *Respondent*, v. SEATTLE AND RENTON
RAILWAY COMPANY, *Appellant*.

WITNESSES — RECALL FOR PURPOSE OF EXPLAINING TESTIMONY.

Permitting the recall of plaintiff for the purpose of explaining her testimony as given originally on the witness stand, and which had apparently been contradicted by the testimony of another witness, would not constitute prejudicial error, especially where the contradictory testimony had been elicited by means of improper cross-examination.

SAME — IMPROPER CROSS-EXAMINATION — IMPEACHMENT.

Testimony improperly elicited on cross-examination cannot be contradicted by the introduction of impeaching testimony.

SAME — DECLARATIONS NOT IN PRESENCE OF PARTY — REBUTTAL.

Declarations prejudicial to plaintiff, made by one not in her presence, cannot be introduced for the purpose of rebuttal, or to impeach the testimony given by one of her witnesses.

CARRIERS — DEFECTIVE PLATFORM — INJURIES TO PASSENGERS — EVIDENCE OF CONTRIBUTORY NEGLIGENCE — ADMISSIBILITY.

In an action for damages for injuries to plaintiff's ankle, received from stepping into a rotten place in a railway platform, evidence on the part of defendant that plaintiff had a weak ankle was immaterial, in the absence of a plea of contributory negligence.

Appeal from Superior Court, King County.—Hon. ARTHUR E. GRIFFIN, Judge. Affirmed.

Peters & Powell, for appellant.

W. E. Humphrey, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—Action for personal damages. The plaintiff brought suit against defendant in the superior court of King county, alleging that she was a passenger in one of defendant's cars running from Seattle to the station

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of Mathieson, and that in getting off said car she stepped into a hole in the platform, which latter was rotten and out of repair, whereby she sprained her ankle, for which she claimed damages in the sum of \$1,000. Defendant answered, denying the acts of negligence complained of, and denying any knowledge or information with respect to the injury or damages. The trial resulted in a judgment in favor of plaintiff for the sum of \$292.50. From said judgment this appeal is taken, and two errors only are assigned: (1) The action of the court in refusing testimony offered by the defendant to impeach plaintiffs' witnesses; (2) permitting the recall of the plaintiff to contradict on the witness stand testimony which she had previously given on her direct examination.

The appellant, in its brief, discusses the second error first, and we will follow that order in disposing of the case. The plaintiff, Mrs. Bailey, on cross-examination testified as follows:

"Q. Now, Mrs. Bailey, that ankle has always been weak, hasn't it? A. No, sir. Q. Didn't you have trouble with it as a girl? A. No, sir; I never had any trouble. Q. With either of your ankles? A. I had no trouble. Q. This trouble is the first you have had? A. That was the first trouble I ever had. If I had ever had any trouble I could not have worked like I did."

Witness Braillard was called for the plaintiff, and testified in her behalf. On cross-examination he testified as follows:

"Q. Didn't Mrs. Bailey at that time tell you, Mr. Braillard, that she had had trouble with that ankle before? That it had been weak? A. At that time? Q. Well, at some time. A. Yes; she told me that when she was a little girl, I think—a child, that she had an accident in getting off a car some place in the East. All I can remember of it was that she was visiting with her folks,

and they got into a railroad car, and in getting off she sprained her ankle.”

Mrs. Bailey was then recalled by the plaintiff, and asked to state which ankle it was which she told Braillard she had injured when a girl. This question was objected to, the objection was overruled, and the answer was as follows:

“It was my right ankle. Well, when my ankle was hurt when I was a little child it did not amount to anything. I don’t even remember telling Mr. Braillard about it, but I certainly did or he would not have remembered about it. But it was my left ankle that was hurt on the Renton car.”

We think it was properly within the discretion of the court to admit this testimony. In the first place, the cross-examination which elicited the statement from the witness Braillard was not properly admitted, his direct examination having reference simply to the condition of the sidewalk at the time of the accident, and the actual occurrence there. In the second place, the object of a law suit is to elicit the truth, and a seeming contradiction was explained by the testimony objected to. We think there was no prejudicial error in its admission.

The second point is with reference to the testimony of the witness Lynde. The defendant had testified that the platform in question had been repaired and made sound on the 26th day of November, 1901, and had no hole or rotten plank in it. The plaintiff, in rebuttal, called her brother-in-law, Lynde, who testified that he got off at this place the day after Mrs. Bailey was injured, and no repairs had been made to the platform at that time, and that they were not made until several days after the accident. Lynde also testified on cross-examination that he did not know that Mrs. Bailey had injured her foot prior to the injury complained of, stating that he never had

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heard of it before, and that he never had stated that she had so injured it. Defendant thereafter called witness Womach, and asked him whether or not the witness Lynde had stated to him that the plaintiff, Mrs. Bailey, had injured her ankle when a girl, and that it was always weak. Plaintiff objected to this on the ground that it was not material to the issue, and was not proper rebuttal or impeachment, which objection was sustained. We think this objection was properly sustained. Mrs. Bailey could not be prejudiced by a statement made by Lynde not in her presence. Hence the defendant could not have introduced the witness Womach to prove that Lynde had said that Mrs. Bailey had a weak ankle, and, the cross-examining party not being entitled to prove it as a part of his case tending to establish his plea, it was not material and could not be proven here in the manner contended for. In addition to this, there was no plea of contributory negligence on the part of the plaintiff to render material the testimony for the purpose of establishing as a fact—which could be the only material fact elicited—that she was negligent in carelessly alighting upon a platform on an unsound limb. Moreover, as in the other point, the direct examination of Lynde was not directed to the questions asked in cross-examination, and they were, therefore, not proper subjects for cross-examination, and it is not error for a court, when improper statements are drawn out on cross-examination, to refuse to allow the party who draws them out to contradict them.

We think no error was committed, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and MOUNT, JJ., concur.

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[No. 4601. Decided September 14, 1903.]

WESTERN LOAN AND SAVINGS COMPANY, *Appellant*, v.
MAGGIE WAISMAN, *Respondent*.

ACKNOWLEDGMENTS — IMPEACHMENT OF NOTARY'S CERTIFICATE.

A notary's certificate of acknowledgment to a mortgage cannot be impeached by the testimony of the mortgagors that the wife never acknowledged it, where they admit that she signed the instrument and that they received and used the money, and their denial of the wife's acknowledgment is uncorroborated by other positive and credible evidence besides their own, except that of a witness who testified that the notary had certified acknowledgments in other cases without the parties appearing before him, but who was without personal knowledge as to the facts in the case on trial.

Appeal from Superior Court, Ferry County—Hon.
CHARLES H. NEAL, Judge. Reversed.

Jesseph & Jesseph, for appellant.

W. T. Beck, for respondent.

The opinion of the court was delivered by

HADLEY, J.—This action was brought by the appellant corporation to recover a personal judgment against the respondent and her husband, and also to foreclose a mortgage alleged to have been given to secure the debt upon which judgment is sought. The husband, Henry Waisman, made default, but the wife, Maggie Waisman, answered, denying that she executed or acknowledged the alleged mortgage. She avers that the real estate described in the complaint and in the alleged mortgage is the homestead property of herself and husband; that she never appeared before the notary purporting to have taken her acknowledgment of the mortgage; and that the certificate of the notary appended to the mortgage is false in so far

as it pertains to her. She asks that the mortgage be declared void, and that it shall be canceled and satisfied of record. The court, after a trial, entered judgment against both respondent and her husband, but denied foreclosure of the mortgage, and declared the same canceled. From that portion of the judgment declaring the cancellation of the mortgage, the plaintiff has appealed.

It is admitted that respondent and her husband and co-defendant both signed the mortgage, and delivered it to the appellant. It is also admitted that they received from appellant the amount of money the payment of which the mortgage purports to secure. Both respondent and her husband testified that she did not acknowledge the mortgage. The certificate of the notary states in regular form that they both appeared before him, and duly acknowledged the execution of the mortgage "freely and voluntarily for the uses and purposes therein mentioned." The certificate also states that both were personally known to the notary. The notary himself was not present at the trial, and did not testify. It appears from the record that his whereabouts may not have been known. The sole question therefore is, was the evidence sufficient to impeach the certificate of the notary, and was it error to refuse a decree of foreclosure? In 1 Cyc., 624, the following rule is stated:

"The testimony of parties to the suit, while carefully scrutinized, is admissible to impeach the certificate and is entitled to the same weight as that of any other interested witness. But the testimony of interested witnesses unsupported by other positive and credible evidence will usually not be allowed to overcome the certificate."

The testimony of the husband and wife in the case at bar is unsupported by any other positive testimony. One other witness was permitted to testify that he knew that

the same notary had certified to other acknowledgments when the parties did not appear before him; but he had no actual personal knowledge as to the fact concerning the acknowledgment in this case. Both husband and wife were interested witnesses. The mortgage purported to be a lien upon what they allege is their homestead. They frankly admit that they received the money as a loan from appellant, and that they both signed and delivered the instrument, which declares upon its face that it was intended as a mortgage upon the land described, for the purpose of securing the said loan. They admit their personal liability, but their interest in impeaching the certificate of acknowledgment arises from the fact that they seek thereby to avoid a lien upon the premises described in the mortgage; and, since the premises are claimed as a homestead, the land might thus be beyond the reach of execution under the general liability. The evidence upon the subject of impeachment is, therefore, that of witnesses who have a direct interest in having such impeachment declared. If the rule above quoted is applied here, the unsupported testimony of respondent and her husband, as directly interested witnesses, is not sufficient to overcome the certificate.

In *Pierce v. Feagans*, 39 Fed. 587, the defendants, who were interested, and another witness, who was disinterested, testified to the falsity of the certificate. The officer who took the acknowledgment denied that the disinterested witness was present when the acknowledgment was taken. It was held that the evidence was not sufficient to overcome the certificate. The court, at page 592, said:

"In a case of this character it is not enough that there is a preponderance of evidence in favor of the defendants if it should be conceded that there is such a preponder-

ance in the present case. In the language of the state courts, which furnishes the rule of decision, the burden is on the defendants, and the proof furnished to overcome the certificate must be 'clear, cogent, and convincing.' It is a record that is assailed,—a record of an official act performed more than six years ago, and made contemporaneously with the acts attested. The record is in due form of law, and it is aided by the presumption that always attends the acts of public officers, that the duty devolved on the officer was properly performed in the manner stated."

That the evidence required to overcome a certificate of acknowledgment must be clear and convincing is generally held, and it may well be said that where fraud or duress is not shown as a circumstance attending an acknowledgment, the unsupported testimony of parties directly interested in the impeachment is not of that clear and convincing character that is necessary to overcome a record and an official act. In Idaho it is held that the evidence necessary to overcome the certificate must be clear and convincing beyond a reasonable doubt. *Gray v. Law*, (Ida.) 57 Pac. 435. In that case the court observed, at pages 436 and 437:

"Unless this rigid rule be enforced, the officer taking the acknowledgment and certifying to the same would be at the mercy of the unscrupulous grantor, and perhaps liable in damages to any party injured by a certificate held to be false."

In Illinois it is held that the certificate must prevail over the unsupported testimony of an interested party, when no fraud or collusion between any party and the officer is shown. *Lickmon v. Harding*, 65 Ill. 505. In that case the court observed:

"Public policy requires such an act should prevail over the unsupported testimony of an interested party, other-

wise, there would be but slight security in titles to land."

The same rule was followed in the later case of *Kerr v. Russell*, 69 Ill. 666 (18 Am. Rep. 634), and the court, by even stronger language, emphasizes the reasons for the rule, saying:

"Public policy, the security of titles, the peace of society, demand such a rule, and a strict adherence to it."

The Illinois cases have been approved and followed in Colorado. *Chivington v. Colorado Springs Co.*, 9 Colo. 597 (14 Pac. 212).

In *Mather v. Jarel*, 33 Fed. 366, a husband and wife and their daughter testified that the officer's certificate was false. They were all directly interested in impeaching the certificate. The court followed the rule of decision in the state of Missouri that, although a certificate of acknowledgment is but *prima facie* evidence of what it contains, and may be overcome without proof of fraud, yet the certificate is proof of a high grade of the facts it asserts, and cannot be overcome without proof that is clear, cogent and convincing. It was held that the certificate was not overcome by the testimony of the interested witnesses. To the same effect is *Insurance Co. v. Nelson*, 103 U. S. 544.

In *Nixon v. Post*, 13 Wash. 181 (43 Pac. 23), this court said, at page 183:

"The deed having been found in the possession of the defendant Mary D. Post, and being in due form, *prima facie* established the facts of its regular execution and delivery. But this *prima facie* case was met by the testimony of the plaintiff to the effect that she never executed the deed, and if this testimony is to be taken as true, it was in our opinion sufficient to overcome the presumption above stated. But public policy will not allow a presumption of this kind to be overcome without clear and con-

vincing proof, and testimony offered for that purpose must be carefully examined in the light of all the surrounding circumstances, and must be of a nature to convince the court of its reliability, before it can be given such force as will overturn a presumption upon which the stability of titles to real estate so largely depends. It was, therefore, the duty of the trial court, before accepting the testimony of the plaintiff as absolutely true, to investigate it in the light of the other circumstances which appeared from the proofs."

Applying the above-stated rule here, what were the attending circumstances that appeared from the evidence? They were that respondent voluntarily signed the instrument, knowing it was intended as a mortgage. She permitted it to pass into the hands of appellant, knowing it was so intended and so accepted. She admits that the money was paid, and must have known that it was paid on the faith of the regular execution of the mortgage. She did not notify appellant that she had not acknowledged the mortgage, and long afterwards, when this suit was brought, she, for the first time to appellant's knowledge, asserted that she did not acknowledge it. These accompanying circumstances are such as lead us to believe that the evidence of the husband and wife, both directly interested in the impeachment of the certificate, is insufficient to overcome the authenticated statement of a disinterested and duly accredited public officer. In the absence of fraud or duress, public policy and the security of land titles require that as important a thing as a certificate of acknowledgment shall not be impeached without that degree of proof which is so clear and convincing that it has not the appearance of being prompted by interested or selfish motives. The rules applicable to the acknowledgment of a deed are equally forcible when applied to a mortgage. In either case, public morals and public

security are best served by the requirement of that degree of proof which is disinterested and unaffected by any private advantage sought, before a certificate of acknowledgment shall be held to be impeached. The testimony of interested witnesses should at least be corroborated by the higher class of evidence.

That portion of the judgment appealed from is therefore reversed, and the cause remanded, with instructions to the lower court to enter a decree foreclosing the mortgage.

FULLERTON, C. J., and DUNBAR, MOUNT and ANDERS, JJ., concur.

[No. 4509. Decided September 17, 1903.]

TACOMA MILL COMPANY, *Appellant*, v. A. P. PERRY,
Respondent.

CUTTING AND REMOVAL OF STANDING TIMBER — WHETHER FELONY OR MISDEMEANOR — CONSTRUCTION OF STATUTES.

Prosecutions for cutting and removing timber fall exclusively under Bal. Code, § 7141, which is addressed to that offense as a misdemeanor, and hence Id., §§ 7108, 7109, defining grand and petty larceny as the felonious stealing and taking away of the personal property or goods of another are superseded by the later enactment of Id., § 7141, in so far as the act of cutting and stealing timber is concerned.

SAME — GROUNDS FOR ATTACHMENT.

The act of cutting and removing standing timber being a misdemeanor and not a felony, the writ of attachment cannot issue against the property of one guilty of such act, in an action against him for damages occasioned thereby.

PLEADING — COUNTER CLAIM — DAMAGES FOR WRONGFUL ATTACHMENT.

A counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in answer to a com-

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plaint in the original action, though the attachment had been dissolved prior to filing of the counterclaim, since such defense would not fall within the purview of Bal. Code, § 4913, permitting counterclaims where defendant has a cause of action connected with the subject of plaintiff's action.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

George C. Israel, for appellant.

W. I. Agnew, for respondent.

The opinion of the court was delivered by

DUNBAR, J.—This was an action for treble damages under the statute for wilfull trespass, in cutting and removing timber, without lawful authority on the part of respondent, from the land of appellant. After the commencement of the action the appellant caused a writ of attachment to be issued against the property of respondent. The writ was issued and levied on the property of respondent, who at once filed a motion to dissolve the same. The motion was sustained on the ground that the writ was unlawfully issued. Thereafter respondent made answer to the complaint both by denial and affirmative pleas, and concluded his answer with a cross-complaint for damages by reason of the levy of the dissolved attachment. The appellant moved the court to strike the cross-complaint for the reason that the same was immaterial, irrelevant, and incompetent, and an improper joinder of causes of defense, and because the matter therein contained, if true, was prematurely pleaded as a cause of defense or a cause of cross-action. This motion was denied, whereupon appellant demurred to said cross-complaint for the reason that it appeared therefrom that the matter therein stated did not constitute a counterclaim to

plaintiff's action. This demurrer was also overruled by the court. Reply was made to the affirmative matter of the answer and cross-complaint, and the cause tried by a jury. Objection was made by appellant to the introduction of any testimony on behalf of respondent under his cross-complaint, which objection was overruled. Respondent obtained judgment on his cross-complaint, from which judgment this appeal is taken.

It is necessary to notice only the first four assignments of error: (1) That the court erred in dissolving the writ of attachment; (2) in granting the motion to strike the word "feloniously" from the complaint; (3) in denying the motion to strike the cross-complaint from the defendant's answer; (4) in overruling the demurrer to respondent's cross-complaint.

The question to be determined under the first assignment is whether the affidavit in attachment charged the defendant with a felony, or whether it fell within the provisions of §§ 7108 and 7109, Bal. Code, or of § 7141, of the same Code. The first statutes mentioned are the statutes defining grand and petit larceny. Section 7141 provides:

"If any person shall wilfully cut down, destroy, or injure any standing or growing tree upon the lands of another, or shall wilfully take or remove from any such lands any timber or wood previously cut or severed from the same, or shall wilfully dig, take, quarry, or remove from any such lands any mineral, earth, or stone, such person, upon conviction thereof, shall be punished by imprisonment in the county jail not less than one month nor more than one year, or by fine not less than fifty nor more than one thousand dollars."

Without entering into a lengthy discussion of this proposition we are satisfied that it was the intention of the law-

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makers to provide in the section above quoted an exclusive punishment for the violation of the provisions of said section, and that to that extent it superseded or repealed §§ 7108 and 7109. This disposes of the second assignment, viz., the alleged error of the court in striking the word "feloniously" from the complaint.

The next two assignments may be considered together, as they raise exactly the same legal proposition. The question is whether under the provisions of the Code a counterclaim for damages arising out of the issuance of an attachment can be pleaded in answer to a complaint in the original action, where the attachment has been dissolved. Section 4912, Bal. Code, provides that the answer of the defendant must contain, first, a general or specific denial of each material allegation of the complaint; second, a statement of any new matter constituting a defense or counterclaim. Section 4913 is as follows:

"The counterclaim mentioned in the preceding section must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

It is evident that the counterclaim in this case did not arise on contract and was not a cause of action arising on contract, and existing at the commencement of the action. Therefore it cannot fall within paragraph 2. It was not a cause of action arising out of the contract or transaction set forth in the complaint as a foundation of the plaintiff's complaint, and, if it is authorized by the statute at

all, it is so authorized by the concluding sentence of § 1, viz., "or connected with the subject of the action." The meaning of the statute is not entirely clear, and there is some little conflict of authority in the construction of similar statutes, though we think the conflict is more seeming than real when the cases are closely scrutinized.

In a very brief case—*Reed v. Chubb Brothers, Barrows & Co.*, 9 Iowa, 178—it is held, that where the affidavit for attachment and the bond are filed and the writ sued out at the commencement of the action, if the writ is wrongfully sued out, any damages sustained by the defendant therefrom constitute a claim held by him at the commencement of the suit in such a sense that it may be set off against plaintiff's demand in the same action. But that, if the attachment bond is filed and the writ of attachment issued after the action is commenced, such claim for damages cannot be pleaded by way of set off in the principal suit. This is the only case we have been able to find which goes to this extent.

Peiser v. Cushman, 46 Tex. 35, cited by respondent, seems to be a miscitation, and we have been unable to find it.

In *Waugenheim v. Graham*, 39 Cal. 169, one of the cases relied upon by respondent, the syllabus is to the effect that, when the plaintiff has unjustifiably and illegally sued out a writ of attachment in the case, and thereby inflicted a great injury upon the defendant, the damages arising therefrom furnish the ground for a cross-complaint in the action; and such is the statement of the judge who wrote the opinion. But an investigation of the case itself shows that the decision in reality will not sustain respondent's contention in this case. In that case the court held against the contention that the counterclaim was properly pleaded, but said:

"In order to avoid any misapprehension on another trial, we are not to be understood as deciding that under proper pleadings on the part of the defendant it would not be competent for him to prove that the plaintiff violated his contract by prematurely suing out his attachment, seizing the saw mill and other property, and thereby wrongfully preventing the defendant from fulfilling the contract for the delivery of the lumber. If the money due to the plaintiff was paid in lumber, to be delivered within a specified time, and if the plaintiff, in violation of the contract, sued out an attachment before the expiration of the time and seized the defendant's saw mill and other property, whereby he was disabled from performing the contract, and from which he suffered other damage, we think this would constitute a valid counterclaim under Section 47 of the Practice Act, the first subdivision of which defines a counterclaim as 'a cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim or defendant's defense, or *connected with the subject of the action.*'"

So that it will be seen that this is an entirely different proposition from the one under discussion in this case. It doubtless is a case in point explaining what is meant by the expression "connected with the subject of the action," and is in line with a class of cases cited by Mr. Bliss in his Code Pleadings, §§ 370, 371; as where, in an action to recover the rent stipulated in a lease, the defendant was allowed to present a counterclaim based on a breach on the part of the plaintiff of other provisions in the same lease. *Orton v. Noonan*, 30 Wis. 611. So, in an action upon the implied agreement to pay for work and labor, the defendant may counterclaim the damages suffered from a breach of the implied agreement that the work shall be skillfully done. *Eaton v. Woolly*, 28 Wis. 628. And in *Hay v. Short*, 49 Mo. 139, it was held that in an action for rent due upon a verbal lease the defend-

ant might show that the plaintiff, by the terms of the lease, agreed to build a certain fence, and counter-demand damages arising from his neglect to build it. Innumerable cases of this kind are presented in the books. But we do not think that the damages claimed by reason of the issuance and levy of the attachment could be said to be in any way connected with the subject of the action. The subject of the action in this case was trespass, and it is difficult to see how damages arising from the execution of a process issued by a court could be in any manner connected with the trespass alleged to have been committed by the defendant. The only object or office of an attachment is to establish a lien on the property of the defendant for the purpose of securing the fruits of the judgment, if one should be obtained; and no action for damages could be commenced on the attachment bond until after the discharge of the attachment, and the cause of action could, therefore, not have existed at the time of the commencement of the original action. To permit a counterclaim of this kind would be to permit a tort occurring after the commencement of an action to be pleaded as a counterclaim to the cause of action originally pleaded. We do not think that, under the most liberal construction, the counterclaim upon which the judgment in this case was obtained should have been received as an answer to the allegations of the complaint, and the court therefore erred in not sustaining the demurrer to the same.

The judgment will be reversed, and the cause remanded, with instructions to sustain the demurrer to defendant's counterclaim.

FULLERTON, C. J., and HADLEY, MOUNT and ANDERS, JJ., concur.

[No. 4625. Decided September 18, 1903.]

E. MAY MACKENZIE, *Appellant*, v. THE STATE OF WASHINGTON, *Respondent*.

SCHOOLS AND SCHOOL DISTRICTS — RE-ELECTION OF TEACHERS — ACCEPTANCE — DISCHARGE.

Where a teacher is re-elected for the ensuing year, and thereafter expresses her gratification to the secretary of the board that she is to have her same work, and during vacation consults with the principal, at his request, in regard to her proposed work, acceptance on her part is sufficiently shown, and the dispensing with her services subsequently upon abolishing the line of work she had conducted, without giving her an opportunity to accept or refuse other work in the school, amounts to a breach of the contract.

SAME.

The acceptance of an offer to teach conveyed by a re-election of a teacher is established by her conference during vacation with the newly elected principal concerning the character of her work for the ensuing year, and a resolution of the board annulling her employment on the ground that it would not be for the best interests of the school amounts to a breach of contract.

NORMAL SCHOOLS — TEACHERS — CERTIFICATES OF QUALIFICATION — NECESSITY.

The certification of qualification of teachers of "higher and special institutions" not being required under that portion of the "Code of Public Instruction" (Laws 1897, title 4, p. 427) devoted to such institutions, but it being the evident intent of the law that such certification shall apply only to teachers under the common-school system, one would not be incapable of entering into a contract to teach in one of the normal schools of the state by reason of not holding a teacher's certificate.

Appeal from Superior Court, Thurston County.—Hon. OLIVER V. LINN, Judge. Reversed.

Graves & Graves, for appellant.

W. B. Stratton, Attorney General, and *E. W. Ross*, for respondent.

The opinion of the court was delivered by

HADLEY, J.—Appellant brought this suit against respondent, and set up in her complaint two causes of action. The first avers that on or about June 21, 1900, appellant was employed by the board of trustees of the state normal school at Cheney, Washington, as a teacher in said school for the period of one year, at the rate of \$500 per year; that thereafter, without excuse, the said board of trustees refused to carry out their said contract, or to pay appellant any salary on account of such employment; that appellant was unable to obtain other employment of a like character, and by such breach of contract she has been damaged in the sum of \$500. For a second cause of action the complaint alleges that about the same date one Rose R. Turner was employed by said board as a teacher in said school for the period of one year at \$1,000 per year; that thereafter the board, without excuse, refused to carry out said contract, or to pay Mrs. Turner any portion of the contract price on account of said employment; that Mrs. Turner was unable to secure other employment of like character for that year, and that by the breach of said contract she was damaged in the sum of \$1,000; that prior to the commencement of this action Mrs. Turner and her husband, by assignment in writing, transferred her cause of action arising from the foregoing facts to appellant. Judgment is demanded upon the two causes of action for \$1,500. The answer avers, with reference to the first cause of action, that at the time stated in the complaint the board of trustees, believing appellant to be duly qualified as a teacher to teach in the schools of the state of Washington, elected her as a member of the corps of teachers in said normal school, but that appellant never in any way signified her accept-

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ance of said election, and she did not agree to teach in said school; that prior to the opening of said school for the year beginning in September, 1900, all teachers employed in the school were, by order of the board, placed under the supervision and control of a principal; that appellant was, by said principal, assigned to the position of assistant in the training department, but that she refused to accept said assignment, and thereafter the board dispensed with her services, and rescinded such election. It is also alleged that appellant was neither qualified to teach in the public schools of the state nor to undertake employment as a teacher in said normal school. Referring to the second cause of action, the answer contains similar averments as to the election of Mrs. Turner, and as to her failure to signify her acceptance of said election. Her qualification as a teacher in the public schools of the state and in said normal school is not made an issue, but it is averred that she refused to assent that her work as a teacher should be subject to the supervision or control of the principal, or that she would comply with the rules and regulations adopted by the board for the management of the school and for the control of the teachers employed therein; that thereafter the board dispensed with her services, and rescinded her said election. The reply admits the allegations as to the election and rescission of the election of the two teachers, and denies all other affirmative averments of the answer. The cause was tried by the court without a jury, and resulted in a judgment that the plaintiff shall take nothing by her action, and that the defendant shall recover costs. The plaintiff has appealed.

It is assigned that the court erred in finding that neither the appellant nor Mrs. Turner accepted her election as

teacher, and that they did not agree to teach in said school. Respondent urges that the action of the trustees was no more than an offer to employ; that such offer was never accepted and therefore no contract was completed. These ladies had been teaching in the school the previous year, and the record of the board of trustees dated June 21, 1900, shows the following: "By motion the following teachers were elected: . . . E. May MacKenzie at \$500 per year; Mrs. R. R. Turner, at \$1,000 per year; . . ." There is evidence to the effect that it was not usual for formal applications to be made to the board for re-election, but that such were made in the cases of first elections only, and that members of the corps of teachers for a previous year were understood to be applicants for re-election without any formal application therefor. Appellant and her assignor both appear to have acted upon such understanding, and appellant urges that, with the applications thus understood, the election completed the contract. Whether this rule was sufficiently well established so that the election could be treated as an acceptance of a standing application in the absence of any notice of its withdrawal from one already a teacher in the school, we do not find it necessary to decide, since, if we assume respondent's position that an election is in no instance more than a mere offer of employment, we think there is sufficient evidence in this case to show that the offer was accepted by both appellant and her assignor. The election occurred about the close of the school year of 1899-1900. Both of these teachers were immediately notified by the secretary of the board of their election. Appellant at the time said to him that she was glad she was "to have the same work," thus indicating her acceptance and her understanding was that she was to have the

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same class of work which had been assigned to her the previous year. The secretary did not inform her of any proposed change in her work. She had previously had charge of the kindergarten department. During the summer vacation, at the request of the newly elected principal, she consulted with him with reference to plans for the coming year's work. He expressed a desire that she might give a portion of her time to the training department. He asked her to think the matter over, and let him know what she thought about it. After a time she addressed a communication to the principal, in which she expressed the view that she could not undertake the proposed work in the training department. She, however, clearly understood that this work was to be in addition to the regular kindergarten work, and she believed she could not do both. During a previous year she had carried the work of the two, but had thereafter, at her own request, been assigned to the kindergarten work only, at a reduced salary. After the receipt of this note from appellant, the kindergarten department was, on the advice of the new principal, abolished, and appellant was notified that her services were not wanted. She was not given the alternative of teaching in the training department or not at all, and it is clear she did not understand that such a course was desired. When she was first elected and signified her assent thereto, it is true she thought she would have the same work as during the previous year, but she was given no opportunity to do or refuse to do training school work after she was informed that the department of her previous work was to be abolished. She was thus formally elected by the board as a teacher for the ensuing year, and she at once expressed her assent thereto, and afterwards conferred with the principal about the work.

No definite understanding as to the scope of her work was then decided upon, but it was discussed with the understanding that the line of her previous work was at least to be carried by her. The conference between her and the principal did not amount to a positive assignment of training school work to her. It was simply left for her to think over as a possible assignment in connection with her other work. The evidence does not show a refusal upon her part to do work positively assigned to her. The respondent contends that she was not elected to do any specific work, but simply as a teacher to receive her assignment from the principal. That being true, when she expressed herself as glad that she was elected, and afterwards entered into conference with the principal concerning her work, we think her conduct amounted to an acceptance of the election. Since she never refused to do the work of a positive assignment, there was no breach upon her part. If, in rescinding her election, the board of trustees shall be held to speak by their record only, then no question of refusal to work as directed was considered. The record upon that subject is as follows:

“Resolved: That on advice of Principal Miller the kindergarten department be discontinued and the services of Miss E. May MacKenzie be dispensed with, and that the secretary be directed to notify Miss MacKenzie of this action.”

Thus it will be seen that the only reason given was the discontinuance of the kindergarten department. The resolution itself, we think, recognizes the existence of the contractual relation, and the reason assigned was not sufficient excuse for rescinding an election regularly made and afterwards acted upon by appellant. If appellant had, at the time of her election, been specially assigned to kindergarten work, the resolution would have been a

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breach of the contract; and since, upon respondent's own theory, she was not so assigned, but was elected generally for any work that should be assigned to her, then by so much more was it a breach to dispense with her services, for the simple reason that the kindergarten work was to be abandoned. The resolution was passed more than two months after the election, and at a time when the schools of the state were about to re-open for a new year's work, with their teaching force already employed. Appellant, relying upon her said election, had not sought other employment. At the beginning of the school year she presented herself ready to do any work that should be assigned to her, but was informed that her services were not desired. She afterwards made reasonable effort to procure other employment, but without success, and we believe she is entitled to recover upon her first cause of action, unless prevented by her own disqualification as a teacher, which subject will be hereinafter discussed.

Turning now to the second cause of action based upon the assigned claim of Mrs. Turner, we find that some time after her election, at the request of the new principal, Mrs. Turner conferred with him about her work for the ensuing year. She had theretofore been in charge of the training department, and the conference was to the effect that she was to continue with the same class of work. She was asked about former methods and the program followed by her, and the principal suggested some changes which he desired. She did not express approval or disapproval of the proposed changes, and says that she fully intended to adopt them at the request of the principal, although she did not in fact believe they were an improvement upon the previous plans and methods. By this conference and consideration of plans for the future work, with no

refusal upon her part to adopt the proposed plans, we think her acceptance of the election made by the board was manifest. Some time after the conference, the new principal, having conceived the idea that she might not work harmoniously with him, so reported to the board of trustees. Thereupon, on August 28—only a few days before the school year was to begin—and at a time when the teaching force throughout the state had been generally employed, the board passed the following resolution:

“Whereas, on the 21st day of June, 1900, Mrs. Rose Rice Turner was employed by this board as principal of the training school for the year following; and

“Whereas, since said employment this board has become convinced that the retention of said Rose Rice Turner would be prejudicial to the best interests of the school;

“Then, it is resolved that said employment is hereby annulled and vacated and said teacher discharged therefrom and said position is hereby declared vacant.”

The language of the above resolution, it seems to us, clearly recognizes that a contractual relation already existed with Mrs. Turner, and we think respondent should not now be heard to say that such was not the fact. In any event, her previous election and her subsequent ratification thereof by her conduct as aforesaid established such relation. Having, by her conduct, thus led the board of trustees to understand that she had accepted her election, she could have been compelled to perform or respond in damages. She also presented herself ready for work at the beginning of the school year, and was denied an assignment. We think there was a breach of contract on the part of the respondent. Mrs. Turner also made reasonable effort to procure other employment, but, for reasons already stated, was unable to succeed. We therefore think appellant is entitled to recover upon her second cause of action.

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If the election of these teachers should be regarded as a mere offer to contract upon respondent's theory, it is nevertheless true that an acceptance of an offer need not necessarily be made in words, but may be inferred from one's acts.

"The proposal or acceptance of an agreement may be communicated by words or by conduct, or partly by the one and partly by the other. In so far as a proposal or acceptance is conveyed by words, it is said to be express. In so far as it is conveyed by conduct, it is said to be tacit. It would be as difficult as it is needless to adduce distinct authority for this statement. Cases are of constant occurrence, and naturally in small matters rather than in great ones, where the proposal, or the acceptance, or both, are signified not by words but by acts. For example, the passenger who steps into a ferryboat thereby requests the ferryman to take him over for the usual fare, and the ferryman accepts this proposal by putting off." Pollock, *Principles of Contract* (Dickson), *pp. 9, 10.

"The acceptance of an offer may be indicated by the acts of the party to whom it is made. In such a case, however, the acts should be regarded as *evidence* of the mental assent essential to the conclusion of a contract, rather than as *constituting* the assent itself." Pomeroy *Contracts* (2d ed.), § 66.

A railroad company published a circular inviting persons to settle and make improvements upon its lands, promising those who should do so a preference right to purchase when the lands should be offered for sale. It was held that this was an offer to sell, which was accepted when one settled upon and improved the land. *Boyd v. Brinckin*, 55 Cal. 427.

It is true the settler afterwards filed a written application to purchase, but the essential act of acceptance was the settling upon and improvement of the land. In the case at bar the elected teachers could not at once, by mere

conduct, accept by actually entering upon the performance of the contract, for that time had not arrived. But their acceptance was manifest as far as conduct could well have shown it, since they readily conferred with the principal at length and in detail about plans for their work. That fact was reported by him to the board, and the latter must thereby have understood that the ladies had accepted their election, and were relying thereon for their next year's employment. This was followed, moreover, by the tender of their services when the time for actual performance came.

It is, however, urged by respondent that appellant cannot, in any event, recover upon her first cause of action, for the reason that she was incapable of entering into a contract, because she held no certificate of qualification as is required of teachers in the common schools. In 1897 the legislature adopted what it denominated the "Code of Public Instruction of the State of Washington." Laws 1897, p. 356 *et seq.* The act is subdivided into titles and chapters, each dealing with a distinct branch of the general subject of schools and education. Under Title 3, at page 384 *et seq.*, "The Common School System" is treated. Chapter 9 under said title, beginning at page 412, treats of the "Certification of Teachers." Title 4 at page 427 *et seq.*, treats of "Higher and Special Institutions." This title is subdivided into chapters relating respectively to state university, agricultural college, normal schools, and school for defective youth. In none of these chapters, and at no place under this title, is any provision made for the certification of teachers, as in the case of the common schools. The general management of these schools, including the selection of teachers, is lodged with the boards of regents and trustees. No provision

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being made for the certification of teachers, it would seem to have been intended that the several boards are to be the judges of the qualifications of the teachers they shall employ. In the cases of all these institutions, except possibly the school for defective youth, it is well understood that the necessary qualifications for teachers are much in advance of those required for common school work, and it follows that the ordinary test of fitness for common school teaching is not a sufficient one for the advanced schools. This may account for the fact that the legislature has not made the common school method of certification applicable to the higher institutions. It was evidently deemed wiser to leave the governing boards of these institutions to satisfy themselves as to the qualifications of these advanced teachers by other and more assuring methods than by examinations and certificates. Respondent refers us to § 51 under chapter 8 of title 2 of the act of 1897. This is found on page 380 of the Session Laws of said year. The title subject is "Officers; their Powers and Duties." The chapter subdivision is entitled "Teachers." The section is as follows:

"No person shall be accounted as a qualified teacher, within the meaning of the school law, who has not first received a certificate issued by the superintendent of public instruction, or who has not a state certificate or life diploma from the state board of education, or who has not a temporary certificate or a special certificate granted by the county superintendent according to law: *Provided*, That nothing in this section shall be construed as invalidating any certificate in force at the time of its passage, but the same shall remain in force for the period for which each was issued."

It is true this section does not appear in that portion of the act relating specifically to the common-school system; but when construed with reference to the whole act, we

think it can be held to apply to those teachers only for whom regulations are by law clearly established for examination as preliminary to holding the certificates mentioned in the section quoted. The regulation for such examination, as we have already said, we think is limited by the terms of the act to teachers under the common-school system. We conclude, therefore, that appellant was not incapable of contracting to teach in one of the normal schools of the state by reason of not holding a certificate.

The judgment is reversed, and the cause remanded, with instructions to the lower court to enter judgment for appellant upon both causes of action.

MOUNT, DUNBAR and ANDERS, JJ., concur.

[No. 4465. Decided September 19, 1903.]

W. J. CORBIN, *Respondent*, v. ORIENTAL TRADING COMPANY, *Appellant*.

EVIDENCE — PRIOR NEGOTIATIONS BEARING ON WRITTEN CONTRACT — WHEN ADMISSIBLE.

The rule that prior negotiations will be presumed as merged in the written contract, when one is entered into, would not forbid evidence of prior negotiations where the contract is one between defendant and a third party, and the design of the evidence is to show plaintiff's part in bringing about such contract at the instance of defendant.

Appeal from Superior Court, King County. — Hon. GEORGE MEADE EMORY, Judge. Affirmed.

Fred H. Peterson, for appellant.

Kerr & McCord and *J. B. Alexander*, for respondent.

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Opinion Per Curiam.

PER CURIAM.—This action was originally brought in the superior court of King county by respondent against M. Tsukuno, C. T. Takahashi, and A. Yamaska, copartners, doing business as the Oriental Trading Company, appellant, and is so designated in the briefs of counsel. It appears from the issues as formulated by the pleadings, in connection with the evidence submitted at the trial, that on the 23d day of April, 1901, the respondent and appellant entered into a written agreement whereby respondent agreed to procure for appellant a contract with the Oregon Sugar Company of La Grande, Oregon, for the hire by the latter company of the appellant of not less than two hundred laborers for the period of at least two months, at the rate of \$1.25 per day (Sundays and overtime at the rate of 16c per hour) for each laborer so furnished, together with railroad fare from the city of Seattle to La Grande. In consideration of procuring such contract, appellant agreed to pay respondent ten (10) cents per day for each laborer furnished to the sugar company, as long as he should continue in its employ, at the price of \$1.25 per day. Appellant also obligated itself to pay respondent the railroad fare furnished as soon as collected from the sugar company, out of which fares the respondent was to pay appellant company the sum of two hundred and fifty dollars (\$250), which might be retained by it. This contract is admitted by the pleadings. It is then alleged by respondent that he did at that date, in pursuance to such agreement, procure execution of the contract between appellant and the sugar company, with certain modifications, at appellant's instance; the material changes being an increase of the price per day from \$1.25 to \$1.30, to be paid by the sugar company to appellant for each laborer furn-

ished who should work for a period of not less than two months, and overtime and Sunday work to be paid at the rate of 20 cents per hour. There were also other changes as to the time for which those laborers were to be employed, and when to be furnished. It is then alleged by respondent that, in pursuance of such contract, a large number of laborers, in excess of one hundred, were furnished by appellant to the sugar company, who worked for the latter more than ninety days; that \$1,500 had been collected by them from the sugar company for fares advanced to laborers. Respondent claims in addition \$900, per centage for laborers furnished, making a total claim of \$2,400, less \$250 to be retained by appellant, leaving \$2,150, the amount for which judgment is asked. Appellant, by its answer, denies these averments, except the first contract; admits that it furnished laborers to the number of ninety-six for the Sugar Company between May 1 and May 22, 1901, and that transportation was paid on that number at the rate of \$9.50 per capita. A trial was had to a jury, who found a verdict in respondent's favor in the sum of \$966. Instructions by the learned trial court were given fully covering all the issues involved in the cause. No exceptions were taken thereto, except the denial of appellant's request directing the jury to find a verdict in its favor.

(1) Error is alleged by appellant company on the grounds of rulings of the court below as to the admission of certain testimony; (2) that the court erred in refusing appellant's request to direct the jury to render a verdict in its favor; (3) for error in denying appellant's motion for a new trial.

While respondent was being examined in his own behalf, the following question was propounded to him by

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his counsel: "I will ask you to state to the jury, Mr. Corbin, what discussion took place between Mr. Tsukuno and yourself at the time that this contract was entered into with reference to that contract of April 23d?" Appellant's counsel objected to the question, on the ground that it was irrelevant and immaterial. No objection was urged by reason of its incompetency. The court overruled the objection, appellant excepted, and witness answered. We do not think the court erred in its ruling, because the testimony sought to be introduced tended to show the efforts made by respondent to comply with his agreement between appellant and himself in procuring the contract between it and the sugar company. Mr. Corbin was not a party to this latter agreement in a sense that he should be precluded from showing, if he could, the facts and circumstances under which such instrument was entered into, and why changes were made from the original draught first submitted in support of his alleged cause of action. The case cited by appellant,—*Staver & Walker v. Rogers*, 3 Wash. 603 (28 Pac. 906),—does not apply. It relates to instances where competent parties have deliberately entered into a written contract where its terms are explicit. In the absence of fraud or mistake, all prior oral negotiations will be considered as merged in the writing. This rule is a salutary one, and is generally adhered to by the courts. There are other assignments as to errors in admitting evidence, but, in the light we view the issues involved, they do not merit further special notice. The evidence thought to be secondary was competent and relevant. Its sufficiency was therefore a matter for the jury's consideration, under proper instructions from the court. We are of the opinion, that the superior court committed no error in denying appellant's request

directing the jury to find in its favor, and in holding that there was sufficient evidence to sustain the verdict. It fully appears that the respondent was the moving spirit in bringing the parties (appellant and the Oregon Sugar Company) together; that laborers were furnished in pursuance of a contract between those parties. The appellant, having availed itself of respondent's services, should compensate him. The amount of damages awarded seems to be fully warranted by the evidence, and, as no new question was suggested on the motion for a new trial, the motion was properly overruled.

Finding no error in the record of which appellant has just or legal cause for complaint, we think the judgment of the trial court should be affirmed, and it is so ordered.

[No. 4531. Decided September 19, 1903.]

MELISSA C. BUDLONG, *Appellant*, v. EDITH J. BUDLONG,
Respondent.

FRAUDULENT CONVEYANCES — CONSIDERATION PASSING BETWEEN HUSBAND AND WIFE.

In an action to set aside a transfer of real estate made by a husband to his second wife as in fraud of certain claims of his first wife, a finding of the validity of the transfer was warranted where the second wife testified that the conveyance was made in consideration of the price of certain furniture purchased from her by her husband about the time of their marriage, that she had assumed and subsequently paid from her own means a mortgage of \$1,500 upon the property, and that the transfer had been made with the consent of the first wife; the testimony of the husband that he received no consideration therefor being entitled to but little weight, owing to its contradictory character.

JUDGMENT — COLLATERAL ATTACK — HARMLESS ERROR.

A finding by the court that a judgment which was collaterally attacked was obtained by fraud does not constitute reversible

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error, when the decree in the subsequent action does not attempt to avoid such fraudulent judgment or its legal effect.

SAME — RES JUDICATA — ISSUES DETERMINED.

A judgment in a prior action between the same parties affecting the same property cannot be *res judicata* upon the issue of fraud raised in the second case, when there were several affirmative defenses, including that of fraud, raised in the original action, and there is nothing in the record to show upon which of the issues the jury based their verdict in the original action.

Appeal from Superior Court, King County. — Hon. BOYD J. TALLMAN, Judge. Affirmed.

Carroll & Carroll, for appellant.

John F. Dore, J. Edwin Keyes and Humes, Miller & Lysons, for respondent.

The opinion of the court was delivered by

MOUNT, J.—This action was begun in January, 1902, to set aside a certain deed to real estate on the ground of fraud, and to subject the real estate to the lien of two judgments rendered after the execution of the deed. The complaint alleges, in substance, that in November, 1893, the defendant George E. Budlong was the owner in fee of lot 8 in block 71 of C. C. Terry's First Addition to Seattle, in King county; that on the 5th of December, 1894, said George E. Budlong, without consideration, and for the purpose and with the intent to deceive and defraud his creditors, and especially the plaintiff, conveyed the said property to his wife, Edith J. Budlong; that the said Edith accepted the said conveyance, knowing the purpose and intent thereof; that subsequently, on October 19, 1901, plaintiff recovered a judgment against both of said defendants, Edith and George E. Budlong, for the sum of \$158.75 and costs, and that on December 3, 1901, plaintiff recovered a judgment against said George E.

Budlong for the sum of \$1,288.50 and interest and costs, which said judgments are of record in King county, wholly unsatisfied. The defendant George E. Budlong made default, and did not appear in the case. The defendant Edith J. Budlong answered the complaint, and denied that there was any fraud in the purchase of the property, but alleged that the same was purchased by her in good faith and for value. She admitted the judgments, as alleged, but alleged that each of them was recovered by fraud practiced upon the court and jury. These allegations of the answer were denied. The foregoing are substantially the issues tried in the case. After hearing the evidence upon the trial, the court found that the defendant George E. Budlong was the owner in fee of the property on November 10, 1893, and that on December 5, 1894, for a good and valuable consideration, with the knowledge and consent of the plaintiff, he conveyed the property to the defendant Edith J. Budlong. The court also found that the two judgments named were obtained by fraud practiced upon the court and jury by the plaintiff and defendant George E. Budlong. Upon these and other findings not necessary to quote, the court entered the following decree:

“Ordered, adjudged and decreed, that defendant Edith J. Budlong is the owner in fee simple of lot 8 in block 71, C. C. Terry’s First Addition to the City of Seattle, King county, Washington, with the appurtenances thereto belonging, free and clear of all incumbrances by reason of any judgments recovered by the above named plaintiff against the defendant George E. Budlong, and that said defendant Edith J. Budlong do have and recover of and from said plaintiff her costs incurred herein to be taxed. Done in open court this 23d day of May, 1902.”

The first and fourth assignments of error are that the

findings, conclusions, judgment, and decree are against the evidence, and are not supported by the evidence or the law. The main question in the case was whether the transfer of the property on December 5, 1894, was fraudulent. The evidence upon this question is somewhat conflicting. George E. Budlong testified that he received no consideration therefor. Edith Budlong testified that she not only paid a consideration for the property at the time, which was the price of certain furniture purchased from her by George E. Budlong about the time of their marriage, but also that she assumed and subsequently paid from her own separate means a mortgage of \$1,500, which was upon the property at the time she bought it. She also testified that the plaintiff consented to her purchase thereof. The evidence of George E. Budlong is very contradictory, and the lower court evidently gave little weight thereto, and we think the court was justified in so doing. Upon the whole evidence, we think the finding that the conveyance of the property to Edith J. Budlong in 1894 was for value in good faith, and with the knowledge and consent of the plaintiff, is borne out by the weight of the evidence.

It is no doubt true that the attack by the defendant upon the two judgments mentioned was a collateral attack, and that, therefore, they cannot be impeached in this action. Black, Judgments, § 290 *et seq.* The findings of the court that the judgments were obtained by fraud and conspiracy practiced by the plaintiff and George E. Budlong upon the court which rendered the judgments, therefore, count for nothing. It is not necessary to reverse the judgment in this case in order to set aside these findings, because the decree did not avoid the judgments, or the legal effect of either of them. The order was "that the

defendant Edith J. Budlong is the owner of lot 8 . . . free and clear of all incumbrances by reason of any judgments recovered by the above named plaintiff *against the defendant George E. Budlong.*" This judgment followed as a matter of course, from the finding that the property was sold by George E. Budlong for value and in good faith prior to the time the judgments were rendered against him. If these judgments are binding only against George E. Budlong, they are not a lien, and could not be executed for his debt against the property of Edith Budlong. If the judgment for \$158.75 against both Edith and George E. Budlong was a lien upon this property at the institution of this action, it is still such lien, because the decree does not have the effect to declare the property free from judgments obtained by the plaintiff against Edith J. Budlong and George E. Budlong jointly. It follows, therefore, that the judgment entered must be affirmed.

The case of *Budlong v. Budlong*, 31 Wash. 228 (71 Pac. 751), was an action by the appellant in this case to recover possession of the same premises in question here. In that case the appellant recovered a judgment for possession of the premises and for rent, which is the judgment for \$158.75, mentioned above. On appeal, that judgment was affirmed by this court. While that case was pending here on appeal, this action was brought independently of the other action, and tried without reference thereto, and no mention thereof is made in this case or in the briefs except a reference thereto by appellant in her "additional authorities." That case could only be urged in this case as *res adjudicata* upon the question of fraud. In that case there were several affirmative defenses to the complaint, among which were that Edith Budlong

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purchased the property from George E. Budlong, and that Melissa Budlong surrendered possession of the property to Edith Budlong, upon an agreement that George E. Budlong should pay her \$18.50 per month, and that security therefor was waived. These different defenses were denied by the reply, and the plaintiff, in further reply, alleged that the conveyance from George E. to Edith Budlong was fraudulent. In the course of the opinion in that case we said:

“The jury could therefore find under the evidence that no actual sale was made, that respondent may have voluntarily yielded possession to appellant simply in consideration of the payment of \$18.50 monthly, and that she did not release her rights in the property under the contract and accept in lieu thereof the unsecured promise of her former husband.”

It therefore appears that the jury may have found in favor of the plaintiff upon all or any one of these questions, and either would have been sufficient to sustain the verdict. Since there is no claim in this case that the verdict was found upon the question of fraud, and since the verdict may have been rendered upon either of the questions in issue, and the record is silent upon the question of fraud, we conclude that the decision in that case is not conclusive of the question of fraud in this. *Marble Savings Bank v. Williams*, 23 Wash. 766 (63 Pac. 511). We call attention to *Budlong v. Budlong*, *supra*, in order to make it clear that we do not by this case disturb the right of possession determined in that case.

For the reasons given, the judgment of the lower court is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4574. Decided September 19, 1903.]

LAURA S. HUGHES *et vir*, Respondents, v. SOUTH BAY
SCHOOL DISTRICT No. 11, Appellant.

DEED — PREMISES CONVEYED — EXCEPTION OF PARCEL FROM GRANT.

Where a deed to plaintiff expressly reserved one acre for school purposes out of one corner of the tract conveyed, she has no standing to assert that the school district had title to but one-half of an acre, from the fact that the original grant to the district had been but a half-acre, and had been so recognized by various grantors in plaintiff's chain of title.

Appeal from Superior Court, Thurston County.—Hon.
OLIVER V. LINN, Judge. Reversed.

Vance & Mitchell and *Phil Skillman*, for appellant.

J. W. Robinson, for respondents.

The opinion of the court was delivered by

DUNBAR, J.—On April 29, 1879, one Nathan Patterson, who was then the owner in fee simple of the northwest quarter of the southeast quarter of section 32, township 19 north, range 1 west, W. M., executed and delivered to the defendant, the South Bay School District No. 11, a certain lease containing the following description, to-wit:

"I do hereby grant and lease one-half acre of land of the northwest quarter of the southeast quarter of section 32, 19 N., of range 1 West, to the South Bay School District No. 11 of Thurston County, W. T., for so long as it shall be used for school purposes. When it ceases to be used as such it shall revert to me, my heirs, executors or assigns. Said one-half acre to be under and contiguous to the present school house near the southwest corner of the above described forty acre."

On February 16, 1880, said Patterson conveyed by war-

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ranty deed to Harlow L. Minkler the premises above described in language as follows, towit:

"The northwest quarter of the southeast quarter of section 32, township 19 N., R. 1 West, Wil. Mer., containing forty acres more or less (subject to a certain lease of half an acre of said tract, executed by the party of the first part to the South Bay School District No. 11, and recorded in Vol. 12 of deeds at page 16)."

On August 20, 1880, said Harlow L. Minkler and wife deeded the above-named property to Ely F. Corliss, and described the same as follows, towit:

"All of the northwest quarter of the southeast quarter of section 32, township 19 north, of range 1 West, Wil. Mer., containing 40 acres more or less, excepting one half acre deeded to the school district known as the South Bay School House."

On July 16, 1889, said Ely F. Corliss and wife deeded to Flora Foster a portion of said premises, and described the same as follows, towit:

"The south half of the northwest quarter of the southeast quarter of section 32, township 19 north, of range 1 West, Wil. Mer., containing 20 acres (less one acre heretofore sold from said tract)."

On June 14, 1890, Flora A. Foster and her husband deeded to the plaintiff Laura S. Hughes said premises and described them as follows, towit:

"The south half of the northwest quarter of the southeast quarter of section 32, township 19 N., R. 1 West, Wil. Mer., according to the official plat on file in the United States land office in Seattle, Washington, reserving out of said grant one acre sold to the school district, intending to convey hereby 19 acres of land."

On July 22, 1898, Ely F. Corliss and wife deeded to the defendant the following portion of said premises, towit:

“An acre of land in a square form in the southwest corner of the northwest quarter of the southeast quarter of section 32, township 19 north, of range 1 West, Wil. Mer., together with all and singular the tenements, hereditaments and appurtenances thereto belonging or in any wise appertaining, and the remainders, rents, issues and profits.”

All of the above mentioned deeds were duly recorded in the auditor's office of Thurston county, Washington. The land leased by Patterson to the school district was occupied by said district for schoolhouse purposes, a school house being erected and maintained thereon. The land in controversy is the extra one-half acre of land which was conveyed by Corliss and wife to the district on July 22, 1898. The plaintiffs (respondents in this action), deeming that respondent Laura S. Hughes was entitled to the possession of said half acre of land, brought an action against the school district, alleging title to the same, and alleging that the defendant claimed some title or interest in and to a portion of the premises situate near or contiguous to the half acre attempted to be described in the lease of Nathan Patterson, or to some portion thereof, adverse to her interest; that the exact character of the claim she was unable to state, but that such claim, whatever it might be, was without right or authority of law, and that the same constituted a cloud upon her title; and asked to have her title quieted and the possession restored. A demurrer was interposed to this complaint on several grounds, among which was that the complaint did not state facts sufficient to constitute a cause of action and that it did not state sufficient to show that plaintiffs were entitled to any equitable relief whatever. The demurrer was overruled, and the case went to trial. Judgment was entered in accordance with

the prayer of the plaintiffs' complaint, quieting title to the land in dispute, for a small amount for the destruction of a fence which it was alleged in the complaint had been removed and destroyed by the defendant, and for costs.

Whether considered from the standpoint of the testimony or of the demurrer to the complaint, this judgment must be reversed. It appears upon the face of the complaint that the title to this land not only never was in the plaintiff Laura S. Hughes, but was never in her grantor. The title to the whole forty acres, subject to the lease of the one-half acre made by Patterson to the school district, descended regularly to Ely F. Corliss, and there it remained until Corliss disposed of it by deed to the school district on July 22, 1898; for when Corliss deeded to Flora A. Foster, the deed called for twenty acres, "less one acre heretofore sold from said tract." This was notice to the grantee, Foster, that she was receiving by deed but nineteen acres of the tract described. This same notice was given to the respondent when she received her deed from Flora A. Foster. In addition it was especially stated in the deed that it was the intention to convey thereby nineteen acres of land. We are at a loss to understand upon what authority or theory the respondent can claim title to nineteen and one-half acres of the above-described land when the deed through which she claims not only reserves one acre, but especially announces the intention to convey but nineteen acres. So that, on the face of the complaint, we think there was no equity shown, and that the demurrer thereto should have been sustained.

But the respondents' case was in no way strengthened by the testimony. The undisputed testimony is that it was the intention and understanding between Corliss and

Flora A. Foster that only nineteen acres was intended to be conveyed by the deed from Corliss to Foster, and that the price paid was so much per acre, viz., \$15 per acre, for nineteen acres. It is also testified to by Corliss that on several occasions after the passing of the deed from Foster to the respondent, the respondent approached him with a request to buy the one-half acre of land in dispute, which request he refused to comply with, stating that he had promised to deed the same to the school district. These conversations, it is true, are denied by the respondent in a deposition; but we are satisfied from the whole testimony in the case, without specially reviewing it (and it was very brief), that not only did no title to the lands in question ever pass to the respondent, but that it never was intended in any of the transactions through which she claims title that such title should pass. Whether the conveyance from Patterson to the school district is a deed or lease, or void or legal, or whether the school district's title is good to the lands in question, are matters which do not concern the respondent, as she must obtain judgment, if at all, on the strength of her own title or right to possession.

The judgment will be reversed, and the cause remanded, with instructions to enter judgment for the appellant, with costs.

FULLERTON, C. J., and MOUNT, HADLEY and ANDERS, JJ., concur.

ON PETITION FOR REHEARING.

PER CURIAM.—In their petition for rehearing respondents complain that the court in its opinion did not correctly describe the half acre of land in controversy; that the actual contest was over a half acre of land surround-

ing the half which was leased to the school district by Patterson.

It is difficult to ascertain from the complaint the exact description of the land over which the contest was waged, the action being to quiet title to the whole of the twenty-acre tract, less the amount actually occupied by the school house. But it is immaterial to the decision of the case, as the whole of the land claimed by the district is an acre of land in square form beneath and surrounding the school house. As to the legal points involved, we are satisfied with the decision heretofore rendered, and the petition will therefore be denied.

[No. 4700. Decided September 19, 1903.]

EDWARD VON TOBEL, *Respondent*, v. STETSON & POST
MILL COMPANY, *Appellant*.

BROKERS — ACTION FOR COMMISSIONS — QUANTUM MERUIT.

A complaint alleging that defendant placed a piece of real estate in plaintiff's hands for sale at a fixed price, agreeing to pay a fixed sum as commission; that by agreement a partial reduction was made in the price; that defendant ascertained who the customer was and itself effected a sale of the property; that defendant refused to pay a reasonable or any commission on account of such sale, though the same was worth \$2,000 and demand had been made therefor, sufficiently states a cause of action on *quantum meruit*.

DEPOSITIONS — CONCLUSIVENESS AGAINST PARTY TAKING.

A party taking a deposition is not bound by statements made against his interest.

SAME — WHEN OFFERED BY ADVERSARY — EFFECT.

A party who offers in evidence a deposition taken by his adversary makes it his own, and hence the one who took the deposition would not be estopped by its statements against his interest.

SAME — LEADING QUESTIONS.

When a party offers a deposition taken by his adversary he adopts it as his own, and cannot object to certain of the interrogatories on the ground that they are leading.

TRIAL — ADMISSION OF EVIDENCE — EXCLUSION OF CROSS EXAMINATION IN DEPOSITION.

The refusal of the court to admit in evidence the cross-examination contained in a deposition until the direct examination had been first offered and read was not error, where the cross-examination was unintelligible without the direct examination to explain it.

ACTION ON ASSIGNED CLAIM — REAL PARTY IN INTEREST.

An assignee in writing of a chose in action who holds the claim by a mere naked legal title has such an interest under Bal. Code, § 4835, as would entitle him to maintain action thereon in his own name.

JUDGMENT — RES JUDICATA.

A judgment in a former action between the same parties for the same cause of action is not *res judicata* when it was merely a judgment of dismissal based on the insufficiency of the complaint.

BROKERS — SALE OF LAND — ACTION FOR COMMISSIONS — INSTRUCTIONS — HARMLESS ERROR.

Where an action for commissions is based on the fact, and is so shown by the evidence, that the owner sold the property to the broker's customer pending negotiations between the broker and the customer, an instruction implying that, in order to find for the owner, the jury must find that the broker failed to find a customer ready, willing and able to buy, and that he had abandoned his efforts to find a purchaser, would be harmless error.

SAME.

In an action by a real estate broker for commissions where the court was instructing upon defendant's theory that the broker had abandoned his efforts to make a sale, language assuming that the broker had the exclusive contract to sell the property would be harmless error.

SAME.

A statement by the judge that "Here we come to some of the most important allegations on the part of the plaintiff, and to some of the most important issues of the case," was not reversible error in the absence of a showing of special injury to the party complaining.

Appeal from Superior Court, King County. — Hon. GEORGE E. MORRIS, Judge. Affirmed.

Allen, Allen & Stratton, for appellant.

Ballinger, Ronald & Battle, for respondent.

The opinion of the court was delivered by

FULLERTON, C. J.—The respondent who was plaintiff below, brought this action against the appellant on an assigned claim to recover the sum of \$2,000, alleged to be due as commissions for the sale of certain real property belonging to appellant. The sale was alleged to have been made by one F. Hochbrunn, a real estate broker, under a contract with the appellant, the claim for commissions having been assigned to the respondent by Hochbrunn by an assignment in writing. The trial was had before a jury, which returned a verdict in favor of the respondent for \$950, for which sum the judgment was entered from which this appeal is taken.

The appellant's first assignment of error goes to the sufficiency of the complaint. It contends that the complaint fails to state facts sufficient to constitute a cause of action, and that the court erred in permitting the respondent to introduce evidence thereunder, over its objection made after the jury had been impaneled and sworn to try the cause. But we think the complaint has in it all of the elements necessary to a good cause of action. While it is long, and recites with much detail the transaction on which the action is founded, in substance it is alleged that the appellant, being the owner of certain real property, placed it in the hands of the assignor of the respondent for sale at a fixed price, agreeing to pay a fixed sum as a commission in case a sale should be effected at the price named; that the assignor procured a person

able and willing to purchase the property, but not at the price at which he had it for sale; that he then applied to the appellant for a reduction in the price, and secured a partial reduction, but not to the sum his customer had then expressed his willingness to pay; that while he was negotiating between the parties, endeavoring to get them to a common understanding, the appellant importuned him to know who his customer was, promising to pay him a reasonable commission if it effected a sale of the property itself to his customer; that he gave the appellant the name of his customer, whereupon the appellant dealt with his customer directly, effecting a sale of the property to him for a consideration of \$70,000, but failed and refused to pay his reasonable or any commission on account of such sale, though the same was worth \$2,000, and demand had been made therefor. It seems to us that this states a cause of action on *quantum meruit*, as the trial court held, and will sustain a judgment for the reasonable value of the services rendered by the respondent's assignor. In the same connection, although not in the order discussed in the briefs, may be noticed the further objection that the evidence is insufficient to justify the verdict. The testimony of Hochbrunn, the principal witness for the respondent, did not differ materially from the allegations of the complaint, and warranted a recovery on the part of the respondent in so far as the question of the preponderance of the evidence was concerned. It appears, however, that the respondent prior to the trial took the deposition of one C. H. Black. At the trial he did not offer it in evidence, whereupon it was introduced by the appellant. The appellant now contends that the respondent is bound by the statements of this witness, and, as these are to be the effect that the re-

spondent's assignor was not the procuring cause of the sale, the respondent cannot recover. But the appellant mistakes the rule. The deposition, had the respondent introduced it, would not have been conclusive against him, even as to statements made against his interest. A deposition does not differ in that respect from the oral evidence of a witness. Contrary evidence may still be introduced, and the question as to where the truth lies left for the determination of the jury. But this rule need not be invoked here. The appellant made the deposition its own when it offered it in evidence. The testimony of the witness became just as much its own as it would have become had the witness been present in person on the respondent's subpoena and called by the appellant. In no view of the case, therefore, can this deposition have the force of an admission by the respondent, and he was not estopped from asserting the truth because of its statements against his interest. On the main question there was evidence to the effect that the respondent's assignor was the procuring cause of the sale. True, this was disputed by both the seller and the purchaser; nevertheless it was a question for the jury, not the court.

It is next complained that the court erred in refusing to grant a nonsuit. The respondent did not testify personally in the action. While Hochbrunn was on the stand he testified that the claim sued upon had been assigned to the respondent as security for a debt, and that the debt had been fully paid prior to the trial. The assignment was in writing, and there had been no reassignment of the claim from the respondent to Hochbrunn. The appellant contends that the payment of the debt itself operated as a reassignment of the claim, and hence the respondent was not the real party in interest. Doubtless, an assign-

ment of a chose in action can be made by parol, and, had the parties wished it, the claim could have been reassigned by parol at the time the debt was paid; but there is no evidence of a reassignment by parol or otherwise, and, in so far as the record shows, the respondent is still the legal owner of the claim. By the Code (§ 4835, Ballinger's) an assignee of a chose in action who holds the same by an assignment in writing may maintain an action thereon in his own name, notwithstanding his assignor may have an interest in the thing assigned. So here, notwithstanding the respondent may have held the claim at the time of the trial by a mere naked legal title, we think he had such an interest as would entitle him to maintain this action in his own name. *McDaniel v. Pressler*, 3 Wash. 636 (29 Pac. 209); *Riddell v. Prichard*, 12 Wash. 601 (41 Pac. 905).

When offering the deposition of C. H. Black, the appellant objected to certain of the interrogatories on the ground that they were leading. Its objections were in part sustained and in part overruled. It assigns error on the objections overruled. Inasmuch as it was the appellant itself offering the deposition, it is somewhat difficult to understand just how it can complain because the court refused to sustain its objection to the questions asked, even though they were originally propounded by the other side. The general rule is that, when a party offers a deposition taken by his adversary, he adopts it as his own, and will not be allowed to deny its competency or legality, or to impeach the veracity of the witness. But, waiving this, we see no error in the ruling in any event. When leading questions will be allowed is largely a matter of discretion with the trial court, to be reviewed only for its abuse. Here there was no abuse of

discretion. The witness' sympathies were clearly with the appellant; so much so in fact that it seemed nothing but a leading question would elicit a direct response from him. In this same connection the appellant complains that the court erred in refusing to permit him to read its cross-examination until the direct examination was first offered and read. Whether a party would in any case be permitted to offer a part of a deposition taken at the instance of his adversary which had not been offered in evidence by the adversary, we are not called on here to determine, as the record shows that this particular ruling was correct. The cross-examination was offered as a whole, and its perusal discloses that a part of it would have been scarcely intelligible without the direct examination to explain it. The court was not called upon to segregate the admissible portions from the inadmissible, and, as the whole was offered, and was not admissible as a whole, it was all properly rejected.

As its first affirmative defense the appellant pleaded as *res judicata* a judgment in a former action between the same parties for the same cause of action. The judgment roll was offered in evidence on this trial, and an objection interposed thereto and sustained. This was not prejudicial error. A perusal of the judgment roll shows that it was a judgment of dismissal based on the insufficiency of the complaint, and did not purport to determine the merits of the controversy. Moreover, it expressly recited that it was without prejudice to another action. In no sense could the judgment have been *res judicata* of the present action.

The appellant next complains that the court erred in refusing to give to the jury certain instructions requested by it. A careful examination of the several assignments has convinced us that no error was committed by the court

in its rulings on any of the matters complained of. All that was material in the requested instructions was given in the general charge; not in the language of the request, perhaps, but in substance; and this we have uniformly held is a sufficient compliance with the requirements of the law in that regard.

Of the instructions given the following is assigned as error:

"I instruct you further, gentlemen of the jury, that if you believe from the evidence in this cause that Mr. Hochbrunn was unable to bring a purchaser, ready, able, and willing to accept the terms of purchase laid down in his contract with the owner of the property, and if you further believe that his own efforts to procure a purchaser had been abandoned, or if you believe that the broker's authority had been terminated in good faith by the defendant, and that subsequent to such abandonment or termination the defendant itself opened negotiations with the final purchaser of the property, and consummated that purchase on account of its own efforts, or on account of the efforts of persons other than Mr. Hochbrunn, that under those circumstances your verdict would have to be for the defendant in this cause."

It is urged that the clause, "and you further believe that his own efforts to procure a purchaser had been abandoned," renders the instruction obnoxious, because it compelled the jury to find not only that the broker had failed to find a purchaser ready, willing, and able to take the property, but that the defendant's efforts to find a purchaser had been abandoned, before the owner could sell; while the law is that in either of these events, and not necessarily on the happening of both, the appellant was entitled to a verdict. It may be that, as an abstract proposition of law, the appellant's contention is correct, but it does not necessarily follow that an instruc-

tion in the form given by the court must in all cases be incorrect. If the facts of the case be that the broker has a prospective customer with whom he is negotiating, and the owner, while such negotiations are pending, sells the property to that customer, clearly the owner is liable for the broker's commission, notwithstanding the broker had not found a purchaser ready, able, and willing to take the property at the terms on which he held the property for sale. Such were the facts in the case before us, if the respondent's contention be true, and we think there was no error in the charge of the court as given, particularly as the court later on explained the distinction between selling to the broker's customer and to a third person.

Another instruction complained of was the following:

"I instruct you, also, gentlemen of the jury, if you believe from the evidence that Mr. Hochbrunn was unable to bring a purchaser ready, willing, and able to buy the property in question at the price demanded, and if you further believe that after such inability had taken place a reasonable time had elapsed within which to complete and to consummate the negotiations on his part—that is to say, on Mr. Hochbrunn's part—after such a time had elapsed, the defendant would be at liberty to proceed on its own account to negotiate and sell, even with Mr. Hochbrunn's customer, and would have the right to consummate that sale through its own efforts or through the efforts of other persons, without the aid of Mr. Hochbrunn; and, if you believe that the evidence in this cause conforms to that state of facts which I have just mentioned, your verdict will have to be for the defendant in this cause."

It is said that this is erroneous, because it assumes that the broker had the exclusive right to sell the property, when there was no evidence that such was his contract. It is plain from the language of the instruction that the court was attempting to charge the jury upon the appel-

lant's theory that the broker had abandoned his efforts to make a sale before it sold to the broker's customer. The instruction was altogether in the appellant's favor, and, even though it be admitted that it does assume the fact imputed to it, the error is harmless in so far as the appellant is concerned. It could in no way have been prejudiced by it.

In charging upon a particular branch of the case the court used these words: "and here we come to some of the most important allegations on the part of the plaintiff, and to some of the most important points at issue in this case", proceeding then to state some of the contentions made by the pleadings. This is objected to because, as the appellant contends, the matters stated by the court were not an issue at all in the pleadings, and consequently could not be some of the most important issues. It seems to us, however, that the matters stated by the court were clearly at issue between the parties not only by the pleadings, but in the evidence also. This being true, it was not error, nor a comment on the facts, for the court to define those issues to the jury. The unhappy part of the instruction is the remark quoted, but we do not think it reversible error. If the remark itself warrants a reversal, then it would warrant a reversal on the assignment of either party, as it was no more directed against the one than the other. But it is rare that a remark of the trial judge can be successfully complained of by both parties to an action. Usually, where it appears to operate equally against both, the one complaining must show some special injury before he can successfully claim error. This rule should, we think, be applied here. And as it does not appear that the appellant was in anyway prejudiced by the remark, it was, if error at all, error without prejudice, and not a cause for reversal.

As we find no reversible error in the record, the judgment will stand affirmed.

MOUNT, HADLEY, ANDERS and DUNBAR, JJ., concur.

[No. 4716. Decided September 19, 1903.]

THE STATE OF WASHINGTON *on the Relation of Otis Sprague v. SUPERIOR COURT OF PIERCE COUNTY et al.*

CERTIORARI — REVIEW OF APPEALABLE ORDER.

Although an order fixing the amount of a supersedeas bond upon an appeal from an order quashing an execution may be appealable, yet the action of the lower court may be examined and corrected by writ of review, where it appears that the remedy by appeal would be manifestly inadequate by reason of a threatened sale under the execution.

SAME — QUESTIONS REVIEWABLE.

The fact that an execution was quashed because the court was of opinion that the judgment upon which it was founded was void would not be considered on the hearing of an application for a writ of review of the court's action, as the validity of the judgment is a matter properly reviewable only by appeal.

APPEAL — SUPERSEDEAS — AMOUNT OF BOND.

Where an appeal in an action is not prosecuted from a final judgment for the recovery of money, but from a final order made after judgment, the superior court has power to fix the amount of the supersedeas bond in a sum less than double the amount involved in the original controversy.

SAME — SELF-EXECUTING ORDER — EFFECT OF SUPERSEDEAS.

An order quashing an execution is self-executing, and is not subject to stay of proceedings on appeal therefrom.

Original Application for Writ of Review.

E. R. York, for petitioner.

John A. Parker and John C. Stallcup, for respondents.

The opinion of the court was delivered by

ANDERS, J.—On January 24, 1894, the Tacoma National Bank recovered a judgment against Otis Sprague, C. Van Horne, and R. W. Derickson, in the superior court of Pierce county, for the sum of \$4,730 and costs of suit. Thereafter that judgment was assigned to one Christian Anderson. On January 19, 1899, the said judgment was, on motion of said Anderson, revived by said court as against said defendant Sprague for the sum of \$6,151.40 including accrued interest and costs, with leave to issue execution thereon. Thereafter, on April 18, 1903, said judgment remaining unsatisfied, an execution was issued at the instance of Anderson, by virtue of which the said sheriff levied upon, and advertised for sale, certain real property in Pierce county. Subsequently, and on April 20, 1903, the petitioner, Otis Sprague, moved to quash and set aside said execution, and to stay and suspend all further proceedings thereon, which motion was granted by the court on May 6, 1903, and all further proceedings upon the writ suspended. On the last-named day a copy of the court's said order was served on the said sheriff. On the following day the said Anderson filed and served a notice of appeal to the supreme court from said order quashing said writ of execution and staying further proceedings thereon, and also an appeal bond. The said Anderson then applied to said court, and to W. O. Chapman, as judge thereof, for an order fixing the amount of a bond to be given by him on his appeal from the order of May 6, 1903, for superseding said order, and the said judge of said court, over the objection of said Otis Sprague, made and caused to be entered an order fixing the sum of \$500 as the amount of such bond. The petitioner, Otis Sprague, thereupon applied to this court

for a writ of certiorari to review the action of said court and the said judge in fixing the amount of said so-called supersedeas bond, alleging in his affidavit for the writ that the said court and the said judge, in making said order, exceeded their jurisdiction, and that "the said order and the making thereof was and is in excess of the jurisdiction of said court and of said judge thereof." He further alleges in his affidavit that the said Christian Anderson has instructed the sheriff to proceed under said writ of execution to sell, and pursuant thereto the said sheriff will proceed to sell, the real property levied upon, before a hearing can be had and a decision obtained upon the appeal of said Anderson, unless the respondents herein are ordered by this court to desist from further proceeding under said writ of execution, pending the decision of this court. The application was granted, and the writ of review issued, and a transcript of the record of the superior court pertaining to the order quashing the said writ of execution, and the order fixing the amount of the said supersedeas bond has been sent up to this court duly certified.

Our statutes provide (Bal. Code, § 5741) that a writ of review shall be granted by any court, except a police or justice court, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board or officer, or one acting illegally, or to correct any erroneous or void proceeding, or a proceeding not in the course of the common law, and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy at law; and that an appeal may be taken "from any final order made after judgment, which affects a substantial right." Laws 1901, p. 29; Bal. Code, § 6500, subd. 7.

And the learned counsel for the respondents contend that under the above-mentioned provisions of the statute the petitioner is not entitled to a writ of review, and therefore move to dismiss this proceeding on the ground that the order fixing the amount of the supersedeas bond is a final and an appealable one, and, consequently, reviewable only by appeal; and they argue that if the order affects a substantial right of petitioner, he is entitled to appeal therefrom, and is not entitled to the writ of review, and, if no substantial right of petitioner is affected by the order, he is not entitled to an appeal or to a writ of review. We think the order in question is appealable, but it does not necessarily follow that it may not be reviewed except by direct appeal. It is, as we have seen, alleged in the petition, and not controverted by the respondents, that the sheriff will proceed to sell the property levied upon under the writ of execution before a hearing can be had and a decision obtained upon the appeal from the order quashing the execution, unless the respondents are ordered to desist from further proceedings under the writ of execution. And it thus appears that the remedy by appeal would be manifestly inadequate, and in such cases we have repeatedly held that this court has jurisdiction by writ of review to examine and correct the orders and judgments of the lower courts: *State ex rel. Meredith v. Tallman*, 24 Wash. 426 (64 Pac. 759); *State ex rel. Cann v. Moore*, 23 Wash. 276 (62 Pac. 769). The motion to dismiss must be denied.

It is asserted by counsel for the respondents that the court below quashed the execution because the judge was of the opinion—and so stated—that the judgment on which it was issued was void; and they insist that, if this pro-

ceeding is sustained, this court should first consider whether the court erred in making the prior order declaring the judgment and execution void. But it is sufficient to observe, in answer to that proposition, that that question is directly involved in Anderson's appeal from that order, and therefore cannot properly be considered in this extraordinary proceeding. The merits of the appeal can be determined only in the manner prescribed by law.

The real questions to be determined in this instance are (1) whether the lower court exceeded its jurisdiction in fixing the amount of the supersedeas bond on appeal from its order, and (2) the effect of such bond upon the order or judgment from which the appeal was taken. Our statute provides that, in order to effect a stay of proceedings, the bond, where the appeal is from a final judgment for the recovery of money, shall be in a penalty double the amount of the damages and costs recovered in such judgment, and in other cases shall be in such penalty, not less than \$200, and sufficient to save the respondent harmless from damages by reason of the appeal, as a judge of the superior court shall prescribe. Bal. Code, § 6506. This court has heretofore held, under this statute, that a superior court is without jurisdiction to fix the amount of a bond to stay proceedings on a judgment for the recovery of money in a sum other than that required by law, and that certiorari is a proper remedy for the review of the action of the court in such cases. *State ex rel. Bridge Co. v. Superior Court*, 11 Wash. 366 (39 Pac. 644). And the learned counsel for the petitioner insists that the lower court exceeded its jurisdiction in this case in fixing the amount of a stay bond in a sum less than double the amount of the judgment and costs, as required by the statute. But, inasmuch as the appeal was not pros-

ecuted from a final judgment for the recovery of money, but from a final order made after judgment, it would seem that the doctrine invoked on behalf of petitioner is not applicable to the facts disclosed by the record. *Kreling v. Kreling*, 116 Cal. 458 (48 Pac. 383). This is simply one of the "other cases" mentioned in the statute in which the judge is empowered to "prescribe" the penalty in the bond to stay proceedings and to save the respondent harmless from damages by reason of the appeal; and we think the court did not exceed its jurisdiction in *fixing the amount of the bond*.

And this brings us to the consideration of the character of the judgment appealed from, and of the effect thereon of the supersedeas bond. As the order quashing the execution requires no process or further action of the court for its enforcement, it is clearly self-executing, and there is, therefore, nothing on which the supersedeas bond in question can operate, except an execution for costs. The effect of such a bond is simply to stay proceedings on the judgment or order appealed from. It does not destroy or vacate the judgment. The ordinary conditions of a stay or supersedeas bond in this state are "that the appellant will satisfy and perform the judgment or order appealed from in case it shall be affirmed, and any judgment or order which the supreme court may render or make, or order to be rendered or made by the superior court" (Bal. Code, § 6506), and such bond is, therefore, intended to secure to the opposite party the fruits of any judgment that may be finally rendered in his favor. To adjudge that the bond under consideration has the effect contended for by the respondents herein would, in effect, be to declare that an appellant may, by his own volition, nullify the judgment or order from which he has ap-

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pealed before a hearing is had in due course of law upon the merits of the appeal. And that no such effect can be given to a supersedeas bond under our statute has been many times decided by this court. See *Fawcett v. Superior Court*, 15 Wash. 342 (46 Pac. 389, 55 Am. St. Rep. 894); *State ex rel. Power Co. v. Stallcup*, 15 Wash. 263 (46 Pac. 251); *State ex rel. Richardson v. Superior Court*, 28 Wash. 677 (69 Pac. 375); *State ex rel. Byers v. Superior Court*, 28 Wash. 403 (68 Pac. 865). See, also, 20 Enc. Pl. & Pr., pp. 1240, 1244, and *Walls v. Palmer*, 64 Ind. 493.

Our conclusion is that all proceedings in the lower court should be suspended pending the appeal, and it is therefore ordered and adjudged that the said superior court of Pierce county and the said sheriff, J. N. Denholm, desist and refrain from any further proceedings looking to a sale of property under said execution, until the determination of the appeal of the said Christian Anderson.

FULLERTON, C. J., and HADLEY, MOUNT and DUNBAR, JJ., concur.

[No. 4606. Decided June 16, 1903.]

AETNA INSURANCE COMPANY, *Respondent*, v. ROBERT G. THOMPSON
et ux., *Appellants*.

Appeal from Superior Court, King County.—Hon. GEORGE C. HATCH, Judge. Affirmed.

Byers & Byers, for appellants.

Preston, Carr & Gilman, for respondent.

PER CURIAM.—This is an appeal from an order of the superior court of King county refusing to discharge an attachment. We have examined the testimony on which the cause was tried, and are not inclined to disturb the judgment of the trial court. Affirmed.

[No. 4484. Decided July 9, 1903.]

JACOB KORFUS *et al.*, *Appellants*, v. J. B. Dow, *Respondent*.

Appeal from Superior Court, Kittitas County.—Hon. FRANK H. RUDKIN, Judge. Affirmed.

Edward F. Hunter and H. E. Foster, for appellants.

Graves & Englehart, for respondent.

PER CURIAM.—The appellants, by deed dated July 25, 1900, conveyed to the respondent, J. B. Dow, an undivided one-half interest in and to certain mining claims; the deed reciting a consideration of five hundred dollars. On the next day the parties entered into a contract by the terms of which the appellants agreed to convey to the respondent, J. B. Dow, an undivided half interest in the same claims on the payment to them by him of \$50,000 on or before a certain date thereafter. The contract of purchase was not complied with, and this action is brought to set aside the deed. The appellants contend that the two instruments formed part of the same transaction, and were not intended to convey title to respondent, but were intended to give him control of the property for the time named in the contract, so that, in case of a sale thereof by him, he could enter into a binding contract of sale without the execution of further instruments on the part of the appellants, and that they were led into executing the instruments in the form the same were so executed through the fraud of the respondent. After issue joined the cause was submitted to a court commissioner to take the evidence and make findings of fact and law. The commissioner found that the instruments were what upon their face they purported to be, that the deed was made upon a valuable consideration, and without any fraud or circumvention on the part of Dow whatever, and was a valid and subsisting deed. The trial court affirmed the conclusions of the commissioner, and the appellants bring the case here. As we view the record, it presents but one question, namely, the fraud of the respondent in procuring the execution of the instruments above mentioned. On this question it is sufficient to say that we have carefully examined the entire record, and find nothing which warrants us in disturbing the conclusion reached by the commissioner and trial court. The judgment will therefore stand affirmed.

Sept. 1903.]

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[No. 4693. Decided August 8, 1903.]

WILLIAM CARNES, *Appellant*, v. A. H. KING *et al.*, *Respondents*.

Appeal from Superior Court, King County.—Hon. BOYD J. TALLMAN, Judge. Affirmed.

Z. B. Rawson, for appellant.

Shank & Smith, for respondents.

PER CURIAM.—In this action the appellant sued to have a deed executed by himself to the respondent, King, on March 6, 1896, declared a mortgage and for certain other relief following as an incident thereto and flowing therefrom. The questions presented in the court below and in this court are wholly questions of fact, depending upon the construction that is to be put upon the acts of the parties at the time the deed was executed and their several relations to the land conveyed subsequent thereto. The trial judge found, after a patient and exhaustive hearing, that the transaction was what upon its face it purported to be, namely, a sale of the land, and this we think is in accord with the weight of the evidence. It has not been our practice to discuss the evidence when no question was involved other than the one as to on which side it preponderates, and we think it would serve no useful purpose to do so in this case. Suffice it to say, therefore, that we have carefully examined the record, and find no reason to reverse the judgment of the trial court. Affirmed.

[No. 4583. Decided September 10, 1903.]

FRED EIDEMILLER *et al.*, *Appellants*, v. W. L. DAVIS *et al.*, *Respondents*.

Appeal from Superior Court, Pierce County.—Hon. WILLIAM O. CHAPMAN, Judge.

Robert B. Lehman and *T. W. Hammond*, for appellants.

Ellis & Fletcher, for respondents.

PER CURIAM.—For the reasons announced in *Eidemiller v. Elder*, *ante*, p. 605, the judgment in this case will be affirmed.

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See CERTIORARI; CRIMINAL LAW, 5, 6, 12, 13; FORCIBLE ENTRY AND DETAINER; GARNISHMENT, 1; MASTER AND SERVANT, 10; PROHIBITION, WRIT OF; SUPERSEDEAS; TAXATION, 7.

APPEARANCE.

General Appearance After Judgment—Effect. Where a judgment was void by reason of defective process, it would not be validated by the fact that the defendants subsequently made a general appearance in the action for the purpose of moving its vacation.—*Woodham v. Anderson* 500

See EXEMPTIONS.

ARBITRATION AND AWARDS. See CONTRACTS, 1, 2.

ASSAULT AND BATTERY.

1. *Assault—Intent to Inflict Bodily Injury—Partial Verdict.* Upon an information for assault with a deadly weapon with intent to murder, under Bal. Code, § 7057, a verdict finding the defendant guilty of "assault with a deadly weapon" does not warrant a sentence for an assault with intent to inflict bodily injury under Bal. Code, § 7058, but only for a simple assault, as the intent is an essential element of the offense and must be found as a fact by the jury.—*State v. Snider* 299
2. *Same.* In such case, while the verdict is to be liberally construed, the intention of the jury to find an intent to inflict bodily injury cannot be inferred from the fact that the information charges, and the instructions define, that offense.—*Id.* 299
3. *Same.* A partial verdict must specify the particular offense.—*Id.* 299
4. *Same—Surplusage in Verdict.* There is no such offense as assault with a deadly weapon, under the law of this state, and the words "with a deadly weapon" in a verdict are to be treated as surplusage.—*Id.* 299

See DAMAGES, 3.

ASSIGNMENT.

Action on Assigned Claim—Real Party in Interest. An assignee in writing of a chose in action who holds the claim by a mere naked legal title has such an interest under Bal. Code, §4835, as would entitle him to maintain action thereon in his own name.—*Von Tobel v. Stetson & Post Mill Co.*..... 683

See MORTGAGES, 3.

ATTACHMENT.

1. *Wrongful Attachment—Action on Bond—Misjoinder of Causes.* In an action on an attachment bond, a complaint asking damages for the value of the goods, for expenses incurred in dissolving the attachment, for loss of time occasioned by the wrongful issuance of the writ, and for attorneys' fees in the action on the bond, is not demurrable on the ground of joining actions *ex contractu* and *ex delicto*, inasmuch as all the damages arise out of the attachment for which the bond had been given.—*Voss v. Bender*..... 566
2. *Same—Probable Cause—Advice of Counsel—When Question for Jury.* The question of probable cause for the issuance of a wrongful attachment, though on the advice of an attorney, is one for the jury and not for the court, where there is evidence tending to show that the attorney was falsely informed as to the facts, or not put in possession of all the facts.—*Id.*..... 566
3. *Grounds for Attachment.* The act of cutting and removing standing timber being a misdemeanor and not a felony, the writ of attachment cannot issue against the property of one guilty of such act, in an action against him for damages occasioned thereby.—*Tacoma Mill Co. v. Perry*..... 650

See PLEADING, 2.

ATTORNEYS. See COURTS; PROCESS, 2; TAXATION, 4; TRIAL, 4.

BASTARDS.

Common-Law Liability. There is no common-law obligation on the part of a putative father to support his illegitimate child.—*State v. Tieman*..... 294

See STATUTES, 4.

BILLS AND NOTES.

1. *Promissory Notes—Action by Indorsee—Sufficiency of Delivery.* *Prima facie* ownership of a promissory note sufficient to uphold action thereon is established by evidence showing that it had been indorsed to plaintiff and action thereon brought in her own name, although she had never had the note in her actual possession and the attorney who brought suit thereon had been selected, not by herself, but by the agent of her indorser.—*Lodge v. Lewis*..... 191
2. *Same—Assignment—Right of Assignee to Sue.* Under Bal. Code, § 4835, which provides that any assignee in writing of any chose in action may sue and maintain an action thereon in his own name, notwithstanding the assignor may have an interest in the thing assigned, but allows the debtor to plead any counterclaim or set-off against the real owner, an indorsee of a promissory note could maintain action thereon, even if title had not passed to the indorsee, and the question of the assignee's right to the note could not, under the circumstances, be raised by the maker.—*Id.*..... 191

See GAMBLING, 1-4; HUSBAND AND WIFE, 1.

BONDS. See APPEAL, 7, 40; FORCIBLE ENTRY AND DETAINER; PRINCIPAL AND SURETY.

BOOM COMPANIES. See EMINENT DOMAIN, 3-5.

BROKERS.

1. *Real Estate Brokers—Agent for Seller and Purchaser—Action for Commissions—Instructions.* In an action by a broker to recover commissions upon a sale of real estate, the refusal of the court to instruct the jury that plaintiff could not recover if they should find that, in making the sale, he was acting as agent for the purchaser as well as for the defendant, and that defendant was not informed of that fact, was not error, when it appeared from the evidence that defendant was aware that plaintiff was acting as agent for both parties.—*Darrow Investment Co. v. Breyman*.....234
2. *Action for Commissions—Quantum Meruit.* A complaint alleging that defendant placed a piece of real estate in plaintiff's hands for sale at a fixed price, agree-

BROKERS—CONTINUED.

ing to pay a fixed sum as commission; that by agreement a partial reduction was made in the price; that defendant ascertained who the customer was and itself effected a sale of the property; that defendant refused to pay a reasonable or any commission on account of such sale, though the same was worth \$2,000 and demand had been made therefor, sufficiently states a cause of action on *quantum meruit*.—*Von Tobel v. Stetson & Post Mill Co.*..... 683

3. *Sale of Land—Action for Commissions—Instructions—Harmless Error.* Where an action for commissions is based on the fact, and is so shown by the evidence, that the owner sold the property to the broker's customer pending negotiations between the broker and the customer, an instruction implying that, in order to find for the owner, the jury must find that the broker failed to find a customer ready, willing and able to buy, and that he had abandoned his efforts to find a purchaser, would be harmless error.—*Id.*..... 683

4. *Same.* In an action by a real estate broker for commissions where the court was instructed upon defendant's theory that the broker had abandoned his efforts to make a sale, language assuming that the broker had the exclusive contract to sell the property would be harmless error.—*Id.*..... 683

BURGLARY.

Building Entered—Flat Car. A flat car loaded with freight, which was covered with a heavy canvas is not the character of structure contemplated by the term "railroad car," so as to make the felonious taking of goods therefrom constitute the crime of burglary, under Bal. Code, § 7104, which defines the crime as the unlawful entry in the night time, or the unlawful breaking and entry in the day time of any house, office, store, railroad car, etc., or any building in which goods are kept.—*State v. Petit.*..... 129

CARRIERS.

1. *Regulation of Common Carriers—Denial of Track Connections by Carrier.* Under Bal. Code, § 4322, which

CARRIERS—CONTINUED.

provides that it shall be unlawful for any railroad to discriminate in charges or facilities for transportation, that every company permitting any one to connect a track with its track for the accommodation of any warehouse or elevator, etc., shall accord the same right to every other person soliciting it, which may be enforced by mandamus at the suit of any person entitled to such right, the owner of a warehouse or elevator cannot compel a railroad company to extend a spur of its track away from its existing tracks and over land not belonging to the railroad, when it has never done a like service to other shippers in the same line of business, but had confined its service to according them facilities for shipment by granting to them leases upon its right of way for the construction of elevators abutting upon its tracks.—*Northwestern Warehouse Co. v. Oregon Ry. & N. Co.*..... 218

2. *Same.* In a proceeding to enforce by mandamus a demand upon a railroad company for an extension of its track to plaintiff's warehouse, an alternative offer to accept from defendant a lease of a portion of its right of way, in accordance with its policy in dealing with other like shippers, cannot be enforced as a demand for a lease, when the offer to accept a lease was too indefinite in its terms to be made the basis for a writ of mandate.—*Id.* 218

3. *Defective Platform—Injuries to Passengers—Evidence of Contributory Negligence—Admissibility.* In an action for damages for injuries to plaintiff's ankle, received from stepping into a rotten place in a railway platform, evidence on the part of defendant that plaintiff had a weak ankle was immaterial, in the absence of a plea of contributory negligence.—*Bailey v. Seattle & Renton Ry. Co.* 640

See CONSTITUTIONAL LAW.

CERTIORARI.

1. *Review of Appealable Order.* Although an order fixing the amount of a supersedeas bond upon an appeal from an order quashing an execution may be appealable, yet the action of the lower court may be examined and cor-

CERTIORARI—CONTINUED.

rected by writ of review, where it appears that the remedy by appeal would be manifestly inadequate by reason of a threatened sale under the execution.—*State ex rel. Sprague v. Superior Court*..... 693

2. *Same*—*Questions Reviewable*. The fact that an execution was quashed because the court was of opinion that the judgment upon which it was founded was void would not be considered on the hearing of an application for a writ of review of the court's action, as the validity of the judgment is a matter properly reviewable only by appeal.—*Id.* 693

COMMUNITY PROPERTY. See HUSBAND AND WIFE, 1, 6;
RECEIVERS, 1.

CONSPIRACY.

1. *Sufficiency of Information*. An information charging defendants with feloniously conspiring together to obtain from a member of the state medical examining board, for a money consideration, the set of questions to be propounded at the ensuing medical examination to be held by said board as required by law, to which answers were to be prepared in advance, so as to enable one of the defendants to pass the examination and thereby fraudulently and unlawfully procure a license to practice medicine, states a cause of action.—*State v. Stewart*..... 103
2. *Evidence—Variance*. Where the charge in an information is the unlawful conspiracy to fraudulently obtain examination questions from the state medical examining board, it would be immaterial whether the questions were actually obtained or not, and hence the admission by the state as a fact that the questions were not so obtained would not constitute a variance.—*Id.* 103
3. *Same*. The fact that one of the conspirators supposed that he was conspiring with a member of the board, through a go-between, when in fact he was conspiring with his co-defendant, would be immaterial, since it is not necessary to show that conspirators actually come together in person.—*Id.*..... 103

CONSTITUTIONAL LAW.

Prevention of Monopolies and Preferences—Self-Executing Provisions. Art. 12, § 15, of the state constitution forbidding discrimination in charges or facilities for transportation to be made by any railroad company, and Id., § 22, prohibiting contracts between companies limiting the production or regulating the transportation of any product or commodity, are not self-executing, but are limited in their operation to such interpretations as have been given them by legislative enactment.—*Northwestern Warehouse Co. v. Oregon Ry. & N. Co.*.... 218

See STATUTES, 1, 2.

CONTEMPT. See DIVORCE, 3.

CONTRACTS.

1. *Construction—Arbitration.* A single clause of a building contract giving the owner the right to fix the amount of the damages owing to delay, and, upon dissent by the contractor, requiring arbitration, must be construed in connection with the other clauses, and does not limit the arbitration to that point, where it is apparent that all matters in dispute are to be arbitrated.—*Childs Lumber & Mfg. Co. v. Page*..... 250
2. *Action on Pleadings—Admissions in Reply.* Where the contract permits the owner to fix the damages for delay and requires arbitration if the contractor dissents, and the reply admits that the damages were fixed, the plaintiff cannot avoid the effect of such admission by showing that the delay was not its fault, that the time had been extended, or that the claim was in bad faith, where those defenses had not been submitted to arbitration or any attempt made to arbitrate; and judgment is properly given on the pleadings for the amount claimed, less the damages fixed.—*Id.*..... 250
3. *Public Policy—Defeating Criminal Prosecution.* A deposit made by a party accused of seduction, which was to be paid to the complaining witness upon dismissal of the prosecution, is void as against public policy, and an action by accused to recover the same is properly dismissed.—*Johnson v. Douglas*..... 293

See EQUITY, 1, 3; SCHOOLS AND SCHOOL DISTRICTS, 9-11; VENDOR AND PURCHASER, 2, 3.

CONVEYANCES. See DEEDS; PARTY WALLS.

CORPORATIONS.

1. *Corporate Officers—Duties to Stockholders—Sale of Stocks.* The purchase by an officer of a corporation of corporate stock from a stockholder is not such a transaction as falls within the trust relations of the parties, as the trust relation of officers and directors extends only to the corporate business and property of the company, and not to their private dealings with stockholders.—*O'Neile v. Ternes*..... 528
2. *Conveyance by Officer—Authority—Estoppel.* Where an officer of a corporation in sole charge of its business falsely represents that he has been authorized to make a sale of certain of its real estate, and fraudulently connives with a fictitious officer to make a conveyance thereof, and the corporation makes no move to disaffirm the conveyance for two years after discovery of the fraud, it is estopped to deny the authority of such officer.—*Coolidge v. Schering*..... 557
3. *Foreign Corporations—Transaction of Business Within State.* The purchase by a foreign corporation of a promissory note or mortgage in this state, with no intention of doing any other act here, is not a transaction of business within the meaning of the statute requiring every such corporation, before transacting business within this state, to record a certified copy of its articles of incorporation and appoint an agent within the state upon whom process can be served.—*Keene Guaranty Savings Bank v. Lawrence*..... 572
4. *Capital Stock—Reduction—Purchase from Stockholder.* A complaint by the receiver of a corporation alleging that the defendant, a stockholder, sold his stock to the corporation and received \$834.50 therefor out of its assets, that the corporation thereby attempted to reduce its capital stock contrary to the law, and that the corporation is now insolvent, and has no assets to pay its creditors, states a cause of action against the stockholder, under Bal. Code, § 4265, providing that it is unlawful to pay any part of the capital stock to the stockholders.—*Tait v. Pigott*..... 345
5. *Same.* It is immaterial that the corporation was solvent at the time of the purchase, if it has since become insolvent.—*Id.*..... 345

CORPORATIONS—CONTINUED.

6. *Same*. The capital stock of a corporation is a trust fund for the payment of its debts, upon the faith of which the law presumes credit to have been given.—*Id.*..... 345
7. *Stockholders*. A person is not a stockholder in a company when he assigns his stock to another for the purpose of selling the same along with other stock within ninety days, where the same is actually sold within the period to an innocent purchaser.—*Jones v. Western Mfg. Co.* 375

See EVIDENCE, 2; NOTARY PUBLIC; VENDOR AND PURCHASER, 1.

COSTS.

Costs Incurred by Pauper—Liability of County. The superior court is without jurisdiction to order the costs of an appeal, prosecuted by an accused *in forma pauperis*, to be charged against the county.—*State ex rel. Langhorne v. Superior Court*..... 80

COUNTIES. See HIGHWAYS; MANDAMUS, 2-4; SCHOOLS AND SCHOOL DISTRICTS, 1-4.

COURTS.

Supreme Court—Jurisdiction—Disbarment of Attorneys. The supreme court has no jurisdiction of proceedings for the disbarment of an attorney, either under constitutional authority, or by virtue of its inherent powers, although the attorney may have perpetrated a fraud upon the superior court in gaining admission to practice. *In re Waugh*..... 50

See APPEAL, 47; COSTS; SUPERSEDEAS.

CRIMINAL LAW.

1. *Information—Jurisdiction of Court—Presumptions*. In a prosecution by information, it will be presumed, in support of the jurisdiction of the superior court, in the absence of a contrary showing, that the defendant was not at the time under indictment for the offense with which he is charged, that the court was in session, and that the grand jury was not in session when the information was filed.—*State v. Melvern*..... 7

CRIMINAL LAW—CONTINUED.

2. *Quashing Information—Grounds.* Under Bal. Code, § 6892, prescribing the grounds for setting aside an information, it was not error for the court to refuse to quash an information upon the alleged grounds that no warrant had ever been issued for the arrest of defendant, that he had never had a preliminary examination, and that, at the time the information was filed, he was restrained of his liberty.—*Id.*..... 7
3. *Jurisdiction of Person of Accused.* The fact that a defendant was arrested, in the first instance, by a person not having a lawful warrant therefor would not be ground for reversal of the judgment for lack of jurisdiction of the person of defendant, when it appears that he was in fact in the custody of an officer, was present in court on the day of his arraignment, entered a plea of not guilty, and was in court throughout the trial.—*Id.*..... 7
4. *Trial—Competency of Experts—By Whom Determined.* The competency of a witness to express an opinion upon a professional or scientific matter is a preliminary question for the trial court to decide.—*Id.*..... 7
5. *Same—Objections to Evidence—Withdrawal.* Objections to testimony will not be considered on appeal, when the objections were immediately withdrawn in the trial court, after being made there.—*Id.*..... 7
6. *Same—Timeliness of Objections.* An objection to a ruling of the court on the admission of evidence must be interposed, under Bal. Code, § 5055, at the time it was made, and not afterwards.—*Id.*..... 7
7. *Instructions—Interest of Accused.* An instruction that the jury have a right to take into consideration the interest in the verdict of a defendant who has testified in his own behalf is not erroneous on the ground of prejudicing the defendant by specially directing attention to his testimony.—*Id.*..... 7
8. *Same—Accused as Witness—Falsus in uno Falsus in Toto.* An instruction that a defendant upon the witness stand subjects himself to all the rules governing the credibility of witnesses, among them the rule that if the jury believe any witness has sworn falsely as to anything material to the issues, they are at liberty to

CRIMINAL LAW—CONTINUED.

- disregard his entire testimony, except where it is corroborated, is a correct statement of the law.—*Id.*..... 7
9. *Failure of Accused to Testify—Duty of Court to Instruct Against Inference of Guilt.* An instruction that the neglect of defendant to testify should not create any presumption against him was a sufficient compliance with the requirements of Bal. Code, § 6941, which provides "that it shall be the duty of the court to instruct the jury that no inference of guilt shall arise against the accused if the accused shall fail or refuse to testify as a witness in his or her own behalf.—*State v. Mitchell.* 64
10. *Instructions—Comment on Facts.* An instruction of the court, stating the theory of one of the parties to the prosecution, and applying the law thereto, in case the jury shall find in accordance with such theory, is not objectionable as being a comment on the facts within the meaning of art. 4, § 16, of the constitution.—*Id.*... 64
11. *Argument of Counsel—Dispute Over Evidence—Mistake of Court—Refusal to Correct.* Where counsel for the state and for the defense dispute one another's statements in their argument to the jury as to whether a certain material and relevant fact was in evidence, and the court waves the dispute aside with the remark that there is no such testimony in the case, and refuses to instruct the jury otherwise when the court is shown by the stenographer's notes to be mistaken, the action of the court constitutes reversible error.—*State v. Priest* 74
12. *Appeal—Sufficiency of Evidence.* Where there is evidence to support the verdict in a criminal prosecution, although it may not be of the most convincing kind, the verdict will not be disturbed on appeal on the ground of the insufficiency of the evidence.—*State v. Ripley* 182
13. *Same—Harmless Error—Refusal to Strike Testimony.* The denial of a motion to strike the answers of a witness to improper questions, to which no objection had been interposed, cannot be urged as error when the answers were not prejudicial to appellant.—*Id.*..... 182
14. *Trial—Adjournment to Procure Witnesses—Discretion of Court.* The granting or refusing an application by

CRIMINAL LAW—CONTINUED.

the accused for the adjournment of a trial to enable him to procure the attendance of absent witnesses is a matter within the discretion of the trial court, whose action will not be disturbed in the absence of a showing of abuse of such discretion.—*Id.*..... 182

15. *Evidence—Admissibility of Hearsay for Purposes of Explanation.* Where a conversation by one of the state's witnesses to the effect that the accused would not get out of jail before he would be arrested again had been put in evidence, it was not error to permit such witness, in explaining his conversation, to show that he understood there were other warrants out for the arrest of accused, even though such testimony as to the warrants was mere hearsay.—*Id.*..... 182
16. *Same—Examination of Witnesses—Rebuttal.* Where testimony had been introduced by the defense tending to convey the impression that a conspiracy existed among the state's witnesses to wrongfully convict the accused, it was not error to permit the state, in rebuttal, to introduce evidence in denial of such alleged plot.—*Id.* 182
17. *Same.* In such a case, evidence in rebuttal was also admissible for the purpose of showing the reputation as a peaceful, law-abiding citizen of a person who was not present at the trial, but who, a witness of the accused had testified, had threatened a witness who intended to appear in the interest of the accused.—*Id.*..... 182
18. *Same—Res Gestae.* Statements made immediately on recovering consciousness by one who had been knocked down and robbed, are admissible as part of the *res gestae*, although made in the absence of the accused and by one who had been drinking just prior to the blow, since the weight to be attached to such statements owing to the mental condition of the witness at the time was for the jury to determine.—*Id.*..... 182
19. *Evidence—Admissions.* Admissions of accused at the preliminary examination, upon being asked by the magistrate whether or not he had any testimony to offer, are not made under the influence of fear produced by threats, and evidence of the same is admissible, although the witness did not say in words that they

CRIMINAL LAW—CONTINUED.

- were made under the influence of fear.—*State v. Carpenter* 254
20. *Same*. Evidence of admissions by accused is admissible where the jailer testifies that no inducements were held out to the accused, and that they were made in the presence of his wife when she was visiting him in the jail.—*Id.* 254
21. *Evidence of Other Crimes—Impeaching Character*. Upon the charge of rape of defendant's daughter, where the defendant's general character has been put in issue, and his wife has testified on cross-examination that a daughter other than the one named in the information never told her that the accused had attempted to commit the crime of rape upon her, it is error requiring a reversal to permit the state to impeach the defendant's character by evidence of a specific crime other than the one for which he is on trial.—*Id.*..... 254
22. *Same*. Neither is it competent to rebut his wife's testimony by evidence of the daughter to the effect that defendant had attempted to have sexual intercourse with her, as the state is concluded by answers on cross-examination pertaining to collateral matters.—*Id.*..... 254
23. *Instructions—Reasonable Doubt*. An instruction as to reasonable doubt approved (following *State v. Krug*, 12 Wash. 288).—*Id.*..... 254
24. *Dismissal—Bar to Another Prosecution*. Under Bal. Code, § 6916, providing that an order of dismissal is a bar in the case of a misdemeanor, but that it is not a bar if the offense charged be a felony, the voluntary dismissal of an information for assault and battery is a complete bar to a conviction for assault and battery, under a subsequent information charging the same facts as constituting the crime of attempting to commit mayhem.—*State v. Durbin*..... 289
25. *Information—Duplicity—Waiver*. An objection to an indictment or information on the ground of duplicity is waived if not made until after verdict.—*State v. Snider*. 299
26. *Assault With Intent to Murder—Information*. An information held sufficient to charge an assault with intent to commit murder, under Bal. Code, § 7057.—*Id.*..... 299

CRIMINAL LAW—CONTINUED.

27. *Verdict—Objections.* Failing to object to the form of a verdict does not preclude the defendant from objecting to its substance, and to the sentence as not warranted by the verdict.—*Id.*..... 299

See ASSAULT AND BATTERY; BURGLARY; CONSPIRACY; EMBEZZLEMENT; HOMICIDE; INDICTMENT AND INFORMATION; RAPE; STATUTES, 1-5; TIMBER; WITNESSES, 1-3.

DAMAGES.

1. *Execution Sale—Action to Set Aside—Damages.* In an action to set aside an execution sale of real property a judgment for more than nominal damages was erroneous, where the only element of damage shown was the worry and discomfort of plaintiff, and that he could make no disposition of the property because of the continuance of the suit,—there being no showing of an actual loss by reason of that fact.—*Whitworth v. McKee* 83
2. *Excessive Damages.* A verdict for \$1,500 for injury to the arm of a common laborer cannot be said to be excessive, where it appears that he was entirely incapacitated from using it for about three months; that he would probably never be able to lift as much with it or use it as dexterously as before; that by reason of the fracture being in the joint of the elbow his suffering had been more acute than in the case of ordinary bone fractures; and that he had spent the sum of \$100 for surgical treatment.—*Selby v. Vancouver Water Works Co.*..... 522
3. *Civil Action for Assault and Battery—Excessive Damages.* A verdict of \$225 for damages because of an assault and battery cannot be said to be excessive, even if no permanent injury were inflicted.—*Schmitz v. Kirchan* 546
4. *Market Value of Cattle Killed—Evidence.* Evidence of the quantity and value of milk given by certain cows, which were chiefly valuable for their milk, is admissible for the purpose of aiding the jury in determining their market value in an action for damages for their death.—*Taylor v. Spokane Falls & N. Ry. Co.*..... 450

See HUSBAND AND WIFE, 5; SALES, 2.

DEATH.

Action for Wrongful Death—Failure to Prove Manner of Death—Nonsuit. In an action against a municipal corporation to recover for wrongful death, alleged to have resulted from defendant's negligence in failing to provide guard rails for foot bridge, plaintiffs were properly nonsuited, where there was no evidence showing that plaintiff had been upon the bridge at the time of his death, and the method of his death was merely a matter of conjecture from the fact that he had been found in the water near the bridge.—*Armstrong v. Town of Cosmopolis*..... 110

DEEDS.

1. *Deeds—Consideration—Love and Affection.* The transfer by a son to his mother for a nominal consideration of his interest as heir in his father's portion of the community estate would be valid as against a subsequent assignee of such interest, where mother and son both testify as to the absence of fraudulent representations in procuring the conveyance to the mother, and state facts showing that it was actually made in consideration of love and affection.—*Marsh v. Marsh*.. 623
2. *Premises Conveyed—Exception of Parcel from Grant.* Where a deed to plaintiff expressly reserved one acre for school purposes out of one corner of the tract conveyed, she has no standing to assert that the school district had title to but one-half of an acre, from the fact that the original grant to the district had been but a half-acre, and had been so recognized by various grantors in plaintiff's chain of title.—*Hughes v. South Bay School District* 678

See PARTY WALLS.

DEPOSITIONS.

1. *Conclusiveness Against Party Taking.* A party taking a deposition is not bound by statements made against his interest.—*Von Tobel v. Stetson & Post Mill Co.*..... 683
2. *Same—When Offered by Adversary—Effect.* A party who offers in evidence a deposition taken by his adversary makes it his own, and hence the one who took the deposition would not be estopped by its statements against his interest.—*Id.*..... 683

DEPOSITIONS—CONTINUED.

3. *Same—Leading Questions.* When a party offers a deposition taken by his adversary he adopts it as his own, and cannot object to certain of the interrogatories on the ground that they are leading.—*Id.*..... 683

See APPEAL, 32; TRIAL, 5.

DISMISSAL AND NONSUIT.

1. *Involuntary Dismissal—Insufficient Service—Service of Complaint on Attorney—Authority Must Be Shown.* An order of the court dismissing an action as to one of the defendants was not erroneous, where no original process had ever been served upon him, but the amended complaint in the action had been served upon an attorney, and the proofs were conflicting as to whether or not the defendant had authorized that manner of service.—*Neff v. Neff* 82
2. *Voluntary Dismissal—Rights of Defendant Asking Affirmative Relief.* In an action brought for the construction of a will and to quiet title thereunder, in which the defendants answered setting up affirmative matter and asked affirmative relief, the plaintiff is not entitled to a voluntary dismissal carrying with it the affirmative matter of the answer.—*McKee v. McKee*..... 247
3. *Equitable Action—Motion for Nonsuit.* The dismissal of an action of equitable cognizance upon a motion for nonsuit would not constitute error, although technically a misnomer of the proper procedure in such cases, if the evidence of plaintiff showed she was entitled to no relief, and that a dismissal was warranted.—*O'Neile v. Ternes* 528

See APPEAL, 21, 22; DEATH; JUDGMENT, 2, 4, 7;
ACCOUNT STATED, 2.

DIVORCE.

1. *Vacation of Decree.* Under Bal. Code, § 4880, which provides that in judgments based upon service by publication, the defendant may, "except in an action for divorce," be allowed to defend within one year after judgment, the court has no power to vacate a decree of divorce, where there was no want of jurisdiction, nor

DIVORCE—CONTINUED.

- fraud practiced in the procurement of the decree.—
Metler v. Metler 494
2. *Same*. The general statutes on the subject of vacation of judgments (Bal. Code, § 4953 *et seq.*), which make no restriction in the case of divorce decrees is superseded in so far as they conflict, by the later enactment of Id., § 4880, which forbids the opening up of decrees of divorce.—*Id.*..... 494
3. *Same—Void Order for Alimony—Contempt*. A judgment convicting plaintiff of contempt for failure to comply with the order of the court requiring him to pay alimony and suit money was erroneous, where such order was made after the court had wrongfully attempted to vacate a decree of divorce and allow the defendant to interpose a cross-complaint.—*Id.*..... 494
4. *Grounds—Sodomy*. Sodomy is sufficient ground for divorce at common law and under Bal. Code, § 5716, authorizing a divorce on "any other cause deemed by the court sufficient."—*Poler v. Poler*..... 400
5. *Evidence—Reputation of Defendant*. In an action for divorce it is not reversible error to exclude evidence of the good reputation of the defendant, when the same is not in issue and is conceded by plaintiff's witnesses.—*Id.* 400

See APPEAL, 45.

EJECTMENT.

1. *Evidence—Location of Lost Meander Corner*. The testimony of a surveyor in a contest over a disputed boundary line is competent and relevant, when it appears that the witness followed one of the recognized rules for restoring lost meander corners in attempting to locate the boundaries of two overlapping claims.—*Simmons v. Jamieson* 619
2. *Same—Form of Verdict*. In an action of ejectment, where defendant admits that plaintiff is the owner of the land described in the complaint and denies that defendant is in the possession and use thereof, a general verdict in favor of defendant would not be erroneous, since the provisions of Bal. Code, § 5510, prescribes that if the verdict be for defendant in ejectment, the

EJECTMENT—CONTINUED.

jury shall find that the plaintiff is not entitled to the possession of the property, would be inapplicable to the circumstances of the case.—*Id.*..... 619

EMBEZZLEMENT.

Evidence—Other Acts Showing General Scheme. In a prosecution for embezzling the funds of an employer, evidence of other acts of the defendant in giving receipts to patrons of his employer and making entries on the books for less amounts than the moneys received is admissible for the purpose of showing the general scheme he adopted in keeping his employer's accounts as tending to show a system employed on his part in furthering such embezzlement.—*State v. Pittam.*..... 137

EMINENT DOMAIN.

1. *Appropriation by One Corporation of Property of Another.* Property held by a corporation, even though actually devoted to a public use, may be taken for a public use by another corporation having the right of eminent domain, provided it is not taken to be used for the same purpose and in the same manner.—*Samish River Boom Co. v. Union Boom Co.*..... 580
2. *Same—Grant of Power—How Determined.* The power of a corporation to take lands already devoted to a public use cannot be presumed simply from a general grant of power to condemn, but must be given either in express terms or by necessary implication.—*Id.*..... 586
3. *Boom Companies—Right to Condemn Property.* Bal. Code, § 4379, which requires a boom company, after filing its articles of incorporation, to file with the secretary of state within ninety days thereafter "a plat of survey of so much of the shore lines of the waters of the state and lands contiguous thereto" as it proposes to appropriate for its corporate purposes, is a grant, by necessary implication, of the power of selecting the designated location by condemnation or otherwise.—*Id.*..... 586
4. *Same—Right Not Affected by Prior Trespass.* The fact that a boom company took possession of lands belonging to the state and used them for boom purposes before

EMINENT DOMAIN—CONTINUED.

- acquiring any right thereto, would not affect its power to condemn the same when subsequently sold by the state to another boom company, when the latter had never been in actual possession of the land so as to be able to use it for boom purposes.—*Id.*..... 586
5. *Same—Bad Faith.* The fact that the company thereafter extended its boom works further down the river than as at first located would not show such bad faith as to affect its right of condemnation.—*Id.*..... 586
6. *Necessity for Taking—What Constitutes.* The “necessity” required to be shown for the appropriation of private property does not mean an absolute and unconditional necessity as determined by physical causes, but a reasonable necessity under the circumstances of the particular case.—*Id.*..... 586
7. *Contestants for Same Location—Priorities.* Where different corporations desire the same location, the one that is prior in point of time is also prior in point of right, and the first location, if followed by construction, operates to secure the prior right.—*Id.*..... 586

EQUITY.

1. *Contract to Convey—Specific Performance.* Where an applicant for the purchase of school lands agrees in writing that, upon receiving a deed, he will convey a portion thereof to the owner of improvements thereon, who was to pay a proportion of the price in installments, and the contract for the purchase from the state is assigned, with notice, and the assignee receives installments of the price from the owner of the improvements, the assignee, upon obtaining a deed from the state, is bound to convey to parties who had succeeded to the interest of the owner of the improvements through the foreclosure of a mortgage thereon, upon a tender by them of the balance due under the written agreement.—*Brummett v. Campbell* 358
2. *Same—Equitable Defense—Directed Verdict.* In an action to recover the possession of land, the plaintiff is not entitled to recover upon legal title alone, where the defendants claim the equitable title, and whether the defendants are entitled to the equitable relief demanded

EQUITY—CONTINUED.

is a question of law for the court, and a verdict is properly directed where such defense is established.—
Id. 358

3. *Same—Contracts—Abrogation.* After the owner of improvements upon school lands had mortgaged the same and his equitable interest in the lands under an agreement for the purchase of the same, he could not cancel and abrogate the agreement to the prejudice of the mortgagee, and the court was justified in disregarding unsatisfactory evidence of such attempted abrogation.—
Id. 358

See DISMISSAL AND NONSUIT, 3; LIMITATION OF ACTIONS, 4.

ESTOPPEL.

Nature of Ground for—Action on Insurance Policy—Injury Caused by Misleading Information. The fact that plaintiff was misled by a mistake of defendant into abandoning a contemplated action on a policy of life insurance for a larger sum, and induced into commencing another one the strength of defendant's admission that the insured had signed a substituted application calling for a different form of policy, would not estop defendant from setting up the truth, where there is no showing that the contemplated action was a valid one and is no longer open to plaintiff, and the costs of the present action appear to be the only injury suffered.—*Hughes v. New York Life Ins. Co.*..... 1

See CORPORATIONS, 2; LANDLORD AND TENANT, 2; MORTGAGES, 2; PARTIES.

EVIDENCE.

1. *Parol Evidence—Warranty on Sale.* Parol evidence of oral warranties is admissible where the only written contract in connection with the sale of machinery was an order for it in the shape of a letter, which did not purport to contain any part of the contract or conditions which the seller was to perform.—*Puget Sound Iron & Steel Works v. Clemmons*..... 36
2. *Parol Proof of Corporate Existence.* Oral proof of the existence of a corporation by one having knowledge

EVIDENCE—CONTINUED.

- thereof is sufficient, when admitted without objection. although the statute may make a certified copy of the articles of incorporation *prima facie* evidence of the facts therein stated.—*State v. Pittam*..... 137
3. *Parol Evidence—Variation of Written Instrument—Rule as to Third Parties.* Evidence of an oral agreement contemporaneous with a deed of conveyance, whereby the grantor was given the right to collect the rents of the premises for a stipulated period after conveyance, is admissible in an action by him to recover such rents, since the rule prohibiting the variation of written instruments by contemporaneous oral agreements applies only to the parties thereto and not to third persons.—*Cormack v. Drum*. 236
4. *Prior Negotiations Bearing on Written Contract—When Admissible.* The rule that prior negotiations will be presumed as merged in the written contract, when one is entered into, would not forbid evidence of prior negotiations where the contract is one between defendant and a third party, and the design of the evidence is to show plaintiff's part in bringing about such contract at the instance of defendant.—*Corbin v. Oriental Trading Co.* 668

See CRIMINAL LAW, 15-22; DEPOSITIONS; DIVORCE, 5; EJECTMENT, 1; EMBEZZLEMENT; HOMICIDE, 1; HUSBAND AND WIFE, 2, 3; RAILROADS, 1, 4; TAXATION, 5, 6; TRIAL, 5; WITNESS, 6.

EXECUTION.

1. *Right to Issue—Repeal of Statute.* Bal. Code, § 5192, which authorizes the issuance of execution by the judgment creditor at any time, provided a period of five years shall not have elapsed since the issuance of a prior execution, in which case execution should not issue until such judgment should be revived, has been modified and superseded by the latter enactment of Bal. Code, §§ 5132, 5143, which limit the lien of all judgments to a period of five years, whether execution has been issued on them in the meantime or not, which, in cases of appeal, shall extend from the date of final judgment in the appellate court.—*Whitworth v. McKee*.... 83

EXECUTION—CONTINUED.

2. *Execution Sale—Action to Set Aside—Evidence—Showing as to Personalty Unlevied on.* In an action to set aside an execution sale of realty, a finding by the court that the judgment debtor had \$1,000 worth of personal property subject to execution was not warranted, where the testimony showed that this property consisted of household goods, office furniture, and a civil engineer's outfit of surveying instruments, since the statute exempts household goods to the value of \$500, and tools of trade to the value of \$500, and permits the selection of additional personal property to the value of \$250.—*Id.* 83
3. *Same—Sale of Real Estate—Existence of Personalty—Presumptions.* A sheriff's return of the sale of real property is not void on its face, by reason of failure to show that no personal property could be found out of which the judgment could be made, but, in a collateral action to set aside the sale, the presumption would be that the officer performed his duty in this respect.—*Id.* . 83
4. *Same—Notice to Judgment Debtor.* Bal. Code, § 4886a, which provides that after a party has once appeared in an action he shall be entitled to at least three days' notice of any trial, motion, application, sale or proceeding therein has no application to proceedings had to enforce the judgment, but merely defines the rights of the respective parties before judgment, and hence would not require notice to a debtor of motion for the confirmation of an execution sale.—*Id.*..... 83
5. *Same—Sales Governed by Existing Law.* The sale of real property under execution has been governed, since its enactment, by Laws 1899, p. 85, whether the execution was issued under a judgment rendered prior or subsequent thereto.—*Id.* 83
6. *Same—Notices of Sale—Posting—Insufficiency.* Laws 1899, p. 86, § 3, requiring the sheriff to post notices of the execution sale of realty "in three public places in the county, one of which shall be at the court house door, where the property is to be sold, and one posted on the property to be sold," is satisfied by the posting in a conspicuous place on the property levied on, although it may not be a "public place"; and by the

EXECUTION—CONTINUED.

- posting upon one of several tracts, although somewhat widely separated, instead of upon each parcel to be sold.—*Id.* 83
7. *Same—Presumption as to Official Duty.* A Sheriff's return reciting that notice of sale was posted in a public place at the court house is not void on its face, under a statute prescribing that the notice shall be posted at the court house door, inasmuch as it does not negative the fact that it was posted at the required place, and the presumption is that the officer complied with the law.—*Id.* 83
8. *Same—Redemption—Liability for Rents of Farming Land.* Although an execution purchaser of land is liable for the rents or value of the use and occupation to a redemptioner of the land, such purchaser could not be held for the value of the use of farming lands, the right of possession of which is especially conferred on the debtor during the period of redemption by Laws 1899, p. 92, § 15, where it appears that the purchaser had not been in possession nor received the benefit of the crops raised thereon.—*Kennedy v. Trumble*..... 614
9. *Same—Action for Accounting Prior to Redemption—Limitations.* An action against an execution purchaser of land for an accounting of rents with a view to redemption, brought more than a year after the sale, is in time, although the purchaser was not liable for any rents, where the purchaser did not comply with a demand for a sworn statement of the profits, and the action was brought within sixty days after demand therefor, as provided by Laws 1899, p. 91, §§ 12, 13.—*Id.* 614
10. *Same—Sworn Statement of Rents Necessary.* The making of a statement of rents and profits received by the purchaser will not affect the extension of time given by the statute in case of a failure to make the statement demanded by the redemptioner, where the one made by the purchaser is not a sworn statement.—*Id.*.. 614

See DAMAGES, 1; EXEMPTIONS; HOMESTEAD.

EXECUTORS AND ADMINISTRATORS.

1. *Claim Against Mortgagor's Estate.* Although the right of a creditor to enforce a mortgage lien against a de-

EXECUTORS AND ADMINISTRATORS—CONTINUED.

- cedent may be barred within six years, he is entitled to its allowance as a claim to be paid out of the decedent's personal estate, when duly presented to the administrator, notwithstanding the fact that a period of twenty years may have elapsed between the death of the mortgagor and the appointment of his representative.—*Gleason v. Hawkins*..... 464
2. *Action on Claims—Limitations.* The limitation in § 4798, Bal. Code, against right of action upon contracts in writing after the expiration of six years is not extended in case of death of a debtor by the provisions of Id., §§ 6226, 6228, requiring notice to creditors and the presentment of claims within one year thereafter, as the latter sections give that right only to claims not already barred by the general statute of limitations.—*Bank of Montreal v. Buchanan*..... 480
3. *Same—Right of Action Against Decedent's Estate.* An action may be commenced against the personal representative of a deceased debtor, even after the statute of limitations has run against the debt, under Bal. Code, § 4810, which provides that "if a person against whom an action may be brought die before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his representatives after the expiration of that time, and within one year after the issuing of letters testamentary or of administration."—*Id.*..... 480
4. *Same—Qualification of Executor—Issuance of Letters—Actions Against—When Bar Begins to Run.* Under Bal. Code, § 6200, an executor is qualified to act as such and take charge of the estate when his bond is filed, whether letters testamentary have been issued or not, and hence the running of the year allowed by Id., § 4810, for the commencement of action against the executor would date from the time of his qualification, although letters were not issued until a subsequent date.—*Id.*..... 480
5. *Same—Laches of Creditor—Not Excused by Executor's Neglect of Duties.* The fact that an executor failed to proceed with the administration of an estate would not excuse a creditor who allowed his claim to become barred by reason thereof, inasmuch as the creditor

EXECUTORS AND ADMINISTRATORS—CONTINUED.

had a remedy under Bal. Code, §§ 6167, 6168, whereby he could have enforced administrative proceedings.—*Id.* 480

6. *Relations Toward Legatees—Fraudulent Purchase of Legacy.* The executor does not sustain such a trust relation to a legatee under the will as to render fraudulent *per se* the purchase by him from the legatee of the property acquired under the will, and only in case of actual fraud could such a sale be set aside.—*O'Neile v. Ternes* 528

7. *Claims Against Estate—Affidavit.* A claim presented to an administrator for allowance must, under Bal. Code, § 6229, be accompanied by the original affidavit of the claimant, and a copy of the affidavit is insufficient.—*Ash v. Clark* 390

See LIMITATIONS OF ACTIONS, 3.

EXEMPTIONS.

Effect of Appearance—Waiver of Exemptions. No time being specified in the statute when the debtor shall claim his property as exempt from levy, his appearance and motion for the dissolution of an attachment would not constitute a waiver of the right to claim his exemptions.—*State ex rel. Hill v. Gardner* 552

See HOMESTEAD; MANDAMUS, 9, 10.

FORCIBLE ENTRY AND DETAINER.

Unlawful Detainer—Supersedeas on Appeal—Liability on Bond—Effect of Satisfaction of Judgment. The fact that judgment in favor of plaintiff in an action of unlawful detainer had been satisfied after affirmance on appeal would not release liability upon a supersedeas bond given for the protection of plaintiff pending the appeal.—*Carmack v. Drum* 236

FRAUDS, STATUTE OF. See EVIDENCE, 3, 4.

FRAUDULENT CONVEYANCES.

Consideration Passing Between Husband and Wife. In an action to set aside a transfer of real estate made by a husband to his second wife as in fraud of certain

FRAUDULENT CONVEYANCES—CONTINUED.

claims of his first wife, a finding of the validity of the transfer was warranted where the second wife testified that the conveyance was made in consideration of the price of certain furniture purchased from her by her husband about the time of their marriage, that she had assumed and subsequently paid from her own means a mortgage of \$1,500 upon the property, and that the transfer had been made with the consent of the first wife; the testimony of the husband that he received no consideration therefor being entitled to but little weight, owing to its contradictory character.—*Budlong v. Budlong*..... 672

GAMBLING.

1. *Contracts—Validity of Checks.* A check issued for money advanced for the purpose of gambling, where the payee wins the money, is void between the parties, under Bal. Code, § 7267, and it is immaterial whether it was won before or after it was advanced.—*Ash v. Clark*. 390
2. *Same—Promise to Pay.* The subsequent promise of the loser to pay invalid checks given for money lost in gambling does not make the checks valid in the hands of any person with notice.—*Id.*..... 390
3. *Same—Evidence—Harmless Error.* In an action to recover on checks given in payment of money lost in a gambling game with G., the introduction in evidence of the records in a police court wherein G. was convicted of conducting a gambling game, is harmless, where the fact was not disputed and was proven beyond question by other competent evidence.—*Id.*..... 390
4. *Negotiable Instruments—Bona Fide Holder.* In an action by an assignee of checks given for money lost in gambling, the jury is properly instructed that the plaintiff can not recover if he knew, when he purchased the checks, of the circumstances under which they were given.—*Id.* 390

See STATUTES, 5.

GARNISHMENT.

1. *Garnishment—Erroneous Judgment—Injunction Improper Remedy.* Injunction will not lie to restrain the enforcement of a judgment against garnishees, where the court had jurisdiction of the subject-matter and the parties, since the remedy of the garnishees, if a finding of indebtedness to the principal defendant was not justified by the evidence, was the correction of such error by appeal.—*Eidemiller v. Elder*..... 605
2. *Same—Money Judgment Against Garnishee Who Disposes of Personal Property.* The fact that garnishee defendants disposed of property of the principal defendant after the service of the writ of garnishment on them would not deprive the court of jurisdiction to make a finding of indebtedness to the principal defendant and enter judgment accordingly.—*Id.*..... 605

HABEAS CORPUS. See **APPEAL**, 7, 8.

HIGHWAYS.

1. *Injunction Against Opening Vacated Road—Sufficiency of Complaint.* A complaint in an action to restrain a road supervisor from opening a highway through plaintiff's land states a cause of action, when it sets up that such proposed road had formerly been a highway but had been vacated by the county commissioners and relocated elsewhere, even though there was no allegation showing the consent of the property owners whose lands were taken for the relocation of the road, inasmuch as the presumption of such consent would arise in the absence of a showing to the contrary.—*Wagner v. Mahrt*..... 542
2. *Same—Presumptions as to Validity of Proceedings.* A finding by the court that a petition to the county commissioners for the vacation and relocation of a road was duly and regularly heard and granted raises the presumption that the evidence disclosed that all the necessary steps were taken by the commissioners to give their action validity.—*Id.*..... 542

See **NEGLIGENCE**, 2.

HOMESTEAD.

1. *Nature of Right—Enactment of New Law—Effect.* The passage of the homestead law of 1895 (Bal. Code, § 5214

HOMESTEAD—CONTINUED.

- et seq.*) whereby the value of the property thereby exempted was increased, but a declaration of the claim was required to be executed, acknowledged and filed with the county auditor, did not operate as an abrogation of homestead rights acquired under the prior law, which had imposed no such duty on the claimant, inasmuch as a homestead is in the nature of a vested interest, which would not be destroyed by the mere repeal of the statute authorizing its acquisition.—*Whitworth v. McKee*..... 83
2. *Excess Value Subject to Sale—How Sold.* Under the statutes of this state, a sale of homestead under a general execution is absolutely void; it can be sold at no time except for its excess of value, and this can be reached only by a sale in the manner provided by the law in force at the time of its selection.—*Id.*..... 83

HOMICIDE.

1. *Evidence—Testimony of Non-Experts.* Testimony relative to the probable distance at which a revolver was held from the head of deceased when it was discharged by one who had experimented with the revolver for the purpose of ascertaining at what distance powder marks similar to those on the face of deceased would be produced is not expert testimony and therefore would not require that the witness qualify as an expert.—*State v. Melvern*..... 7
2. *Instructions—Overcoming Presumption of Murder in Second Degree.* An instruction that "where a homicide is proved beyond a reasonable doubt, the presumption is that it is murder in the second degree. If the state would elevate it to murder in the first degree, it must establish the characteristics of that crime, and if the prisoner would reduce it to manslaughter the burden is on him," is not open to the objection that it charges the jury the burden is on defendant to prove himself not guilty of murder in the second degree.—*Id.*..... 7

HUSBAND AND WIFE.

1. *Execution of Renewal Notes—Liability of Community Estate.* A community estate would not be rendered liable by the execution of renewal promissory notes by

HUSBAND AND WIFE—CONTINUED.

- one of the spouses after the death of the other, whether such notes were executed in his capacity as executor or as a survivor of the community.—*Bank of Montreal v. Buchanan*..... 480
2. *Alienation of Affections—Action by Wife—Evidence.* In an action for the alienation of her husband's affections where it was not contended by the plaintiff, either in her complaint or evidence, that any one act of the defendant caused the separation of herself and husband, it was not error for the court to refuse to permit cross-examination of plaintiff requiring her to name some one act which caused the separation.—*Stanley v. Stanley* 489.
3. *Same.* In such an action, the complaint in a prior action by the husband for divorce was admissible in evidence as a declaration of the defendant, where the attorney who drew it up had already testified that he procured the facts therefor from the defendant in the present action.—*Id.*..... 489
4. *Same—Instructions—Elements of Damage—Loss of Support.* A charge to the jury in such a case they might consider loss of support as an element of damage was not erroneous, although there had been no direct evidence as to its money value, when there was evidence before the jury showing the circumstances and conditions in life of the husband and wife.—*Id.*..... 489
5. *Same—Excessive Damages.* A verdict for \$3,500 for the alienation of a husband's affections is not so excessive as to appear to be the result of passion and prejudice on the part of the jury.—*Id.*..... 489
6. *Separate Property—Forfeiture of Land Grant—Purchase of Public Lands by Surviving Spouse.* The purchase by a surviving husband of lands which had been forfeited to the government by act of congress as part of the unearned grant to a railway company, under the preference right given thereby to one in possession, would give him a separate estate therein, even though the lands had been taken possession of by himself and wife, during the existence of the community, under conveyance from the railway company.—*Carratt v. Carratt* 517

See DIVORCE; FRAUDULENT CONVEYANCES.

INDIANS. See PUBLIC LANDS, 1, 2.

INDICTMENT AND INFORMATION.

Prosecution by Information—Allegation of Prerequisites. The existence of the facts or conditions which the statute enumerates as prerequisites to the right to prosecute by information need not be set forth in the information itself.—*State v. Melvern*..... 7

See CONSPIRACY, 1; CRIMINAL LAW, 1, 2, 25, 26;
RAPE.

INJUNCTION. See GARNISHMENT, 1; HIGHWAYS, 1.

INSTRUCTIONS. See APPEAL, 29; BROKERS, 1, 3, 4; CRIMINAL LAW, 7-10, 23; GAMBLING, 4; HOMICIDE, 2; HUSBAND AND WIFE, 4; NEGLIGENCE, 3; TRIAL, 6.

INSURANCE.

1. *Accident Insurance—Internal Injury Caused by Lifting Heavy Weight.* A violent dilation of the heart, resulting in death, which was caused by the act of lifting a heavy weight in the course of business, falls within provisions of an accident policy insuring against effect of bodily injuries caused solely by external, violent, and accidental means.—*Horsfall v. Pacific Mutual Life Ins. Co.* 132
2. *Same—External Marks.* Where the death of a strong, healthy man resulted from dilation of the heart, caused by lifting a heavy weight, the facts that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold and covered with perspiration, and the next day his skin, previously ruddy, became a bluish gray color and so remained until his death, constitute such visible, external marks of the injury as to bring the case within the terms of a policy providing against liability in case no external marks of injury appear.—*Id.* 132
3. *Same—Notice of Accident—Reasonable Time—Question for Jury.* The provision of an insurance policy requiring immediate notice of an accident to be given to the company ordinarily means within a reasonable time; and, in an action for death, without any claim for weekly indemnity, the question of unreasonable delay

INSURANCE—CONTINUED.

was properly one for the jury, where notice was given twelve days after the death of the insured, which was thirty-seven days after his injury, under a policy providing for weekly indemnity and for a principal sum in case of death within ninety days, and that unless the claimant gives immediate written notice of any accident, with full particulars, and affirmative proof of death within ninety days from the time of death, all such claims shall be forfeited.—*Id.*..... 132

See ESTOPPEL.

INTERVENTION. See APPEAL, 10.

IRRIGATION. See WATER AND WATER COURSES, 1, 2.

JUDGMENT.

1. *Commencement of Lien—Effect of Appeal.* Where appeal has been taken from a judgment, the lien of the judgment does not become dormant until five years after the final determination of the cause on appeal, under Bal. Code, § 5132, which provides that the real estate of a judgment debtor shall be bound to satisfy any judgment "for the period of five years from the day on which such judgment was rendered," and *Id.*, § 5143, which provides that "in all cases of an appeal the date of final judgment in the supreme court shall be the time from which said five years shall commence to run."—*Whitworth v. McKee*..... 83
2. *Vacation—Irregularity.* Where no challenge to the insufficiency of a complaint had been interposed by defendant, a judgment of dismissal on the ground of its insufficiency, made by the court upon its motion upon the hearing of an interlocutory motion, while issues of fact were pending for determination, was such an irregularity as to afford ground for the vacation of the judgment, under Bal. Code, § 5153, which authorizes vacation for "irregularity in obtaining the judgment or order."—*State ex rel. Hennessy v. Huston*..... 154
3. *Same—Sufficiency of Motion.* A motion to vacate and set aside a judgment reciting "that this action be, and the same is hereby, dismissed at the plaintiff's costs," is broad enough to authorize the vacation of another

JUDGMENT—CONTINUED.

portion of the same judgment reciting "that there is no equity in the complaint, and that the equities of this cause are with the defendants," where the latter recital is merely the conclusion of law upon which the dismissal was based.—*Id.*..... 154

4. *Res Judicata—Mistaken Motion for Nonsuit—Effect.* A judgment of nonsuit on motion therefor, which was granted on the ground that the plaintiff failed to prove its corporate capacity, the findings of fact and conclusions of law showing that the merits of the controversy were not considered, but they and the judgment all reciting the making and sustaining of the motion for nonsuit, would not be *res judicata* as to a second action, although defendant might have been entitled to a judgment on the merits, in case of the proper motion therefor.—*Union Bank v. Nelson.*..... 208
5. *Collateral Attack—Harmless Error.* A finding by the court that a judgment which was collaterally attacked was obtained by fraud does not constitute reversible error, when the decree in the subsequent action does not attempt to avoid such fraudulent judgment or its legal effect.—*Budlong v. Budlong.*..... 672
6. *Same—Res Judicata—Issues Determined.* A judgment in a prior action between the same parties affecting the same property cannot be *res judicata* upon the issue of fraud raised in the second case, when there were several affirmative defenses, including that of fraud, raised in the original action, and there is nothing in the record to show upon which of the issues the jury based their verdict in the original action.—*Id.*..... 672
7. *Res Judicata.* A judgment in a former action between the same parties for the same cause of action is not *res judicata* when it was merely a judgment of dismissal based on the insufficiency of the complaint.—*Von Tobel v. Stetson & Post Mill Co.*..... 683

See APPEAL, 9, 13-16, 23; APPEARANCE; DIVORCE, 1-3;
PROHIBITION, WRIT OF; TAXATION, 1, 3.

JURISDICTION. See APPEAL, 47; COSTS; GARNISHMENT, 2;
SUPERSEDEAS.

LANDLORD AND TENANT.

1. *Eviction—Damages.* Actual force is not necessary to effect an eviction, but any interference with the tenant's beneficial enjoyment is sufficient.—*Wusthoff v. Schwartz* 337
2. *Same—Estoppel.* Where the landlord commenced to make repairs about the middle of May, the tenants making no objection, and paying rent in advance on June first for one month, and where the repairs continued during the month of June, becoming more and more troublesome, until the entire basement was torn up, the porches became dangerous, the back entrance was nailed up and the front steps were about to be torn down, which would have effectually prevented all passing to and from the house, at which time (June 17) the tenants moved out, the landlord was guilty of an eviction, and neither the silence of the tenants, nor the payment of rent for June after the commencement of the repairs would estop them from claiming the damages suffered by the eviction.—*Id.* 337
3. *Same—Agency—Liability for Acts of Agent.* Upon an eviction by the making of repairs, interfering with the tenants' quiet enjoyment of the premises, the landlord is not relieved from liability by the fact that the work was done by contractors who had been instructed not to proceed until the tenants had given consent, as they were agents of the landlord, and he was liable for their acts done within the apparent scope of their authority.—*Id.* 337
4. *Unlawful Detainer—Merger of Estates.* Where the lessee of a building sublets the second and third floors for the whole of the term of several years for \$50 a month, and subsequently the second floor is surrendered by the sub-tenant, who then pays \$20 per month, and the sub-tenant testifies that it was only a temporary surrender until he had use for it, while his landlord testifies that it was an absolute surrender and claims a merger, a verdict of restitution in favor of the sub-tenant and damages for detention resolves the question in his favor, and there could be no merger of estates by the temporary surrender.—*Tolsma v. Adair* 383
5. *Same.* There was no merger in law, because there was an intermediate estate, retained by the sub-tenant,

LANDLORD AND TENANT—CONTINUED.

- who did not yield his whole estate, but only carved out a lesser estate, a tenancy from month to month for a limited time.—*Id.*..... 383
6. *Same.* The fact that the tenant ceased to pay the \$50 per month, is not conclusive as to the merger, and the fact that he continued to pay one-half the water rent of the whole building is argumentative support for his contention that there was no merger.—*Id.*..... 383

See FORCIBLE ENTRY AND DETAINER.

LIENS. See JUDGMENT, 1; MECHANICS' LIENS; TAXATION, 9.

LIMITATION OF ACTIONS.

1. *Suspension by Statutory Prohibition.* The fact that a mortgagee delayed the bringing of a personal action against the indorsers on the note secured by the mortgage until after the conclusion of the foreclosure proceeding would not operate as a suspension of the statute of limitations under Bal. Code, § 4812, which provides that "when the commencement of an action is stayed by injunction or a statutory prohibition, the time of the continuance of the injunction or prohibition shall not be a part of the time limited for the commencement of the action," by reason of the fact that the mortgagee is prohibited by *Id.*, § 5893, from prosecuting any other action for the same debt while foreclosing his mortgage, inasmuch as the remedy was open to the mortgagee of including the personal action with the foreclosure proceeding.—*Hinchman v. Anderson.* 198
2. *Mortgages—Death of Mortgagor—Limitation on Foreclosure.* A mortgage lien upon real estate, being capable of enforcement against the successors in interest of a deceased mortgagor, without the intervention of probate proceedings, an action to foreclose would be governed by the general statute (Bal. Code, § 4798) limiting right of action to six years.—*Gleason v. Hawkins.*.. 464
3. *Same—Enforcement Against Personal Representative—Limitations.* Bal. Code, § 4810, which authorizes action within one year after the issuance of letters testamentary or of administration, in cases where the debtor died

LIMITATIONS OF ACTIONS—CONTINUED.

before the bar of the statute had intervened is superseded by the later enactment of Id., § 4642, which provides that no real estate of a deceased person shall be liable for his debts unless letters testamentary or of administration be granted within six years from the date of death of such decedent," and hence mortgage foreclosure proceedings against a decedent's realty, brought within one year after the issuance of letters, but not until twenty years after the mortgagor's death, were barred.—*Id.*..... 464

4. *Trusts—Fraud—Laches.* Where lands were conveyed in 1885 to a surety, as trustee to sell and pay a debt of \$1,100, and after selling nearly all the land in 1890 there was a large surplus in the hands of the trustee, who fraudulently represented that there was a balance still due him of \$600 after the sale of all the land (which had cost \$2,200), and a settlement was then made whereby the owner gave the trustee a note for \$500 for such supposed balance, and the fraud was discovered in 1897 by learning of an indorsement on the note of \$450 on account of land sales, and by an inspection of the public records, disclosing deeds nearly all filed prior to the settlement, and all filed prior to 1892, and the owner knew that the sales were being made from 1885 to 1890, and lived in the town where the sales were made practically all the time, and had easy access to the records, and was a man of ordinary intelligence, holding responsible public office, he is guilty of such negligence in not discovering the fraud for more than six years after the repudiation of the trust relation that he will be held to have discovered it more than three years before the action was begun, and the same is barred by the statute of limitations.—*Irwin v. Holbrook*..... 349

See EXECUTORS AND ADMINISTRATORS, 2-4.

LIS PENDENS. See QUIETING TITLE, 1, 2.

MANDAMUS.

1. *Omission of Legal Duty.* The writ of mandamus will not issue in anticipation of a supposed omission of duty, but it must appear that there has been an actual default in the performance of a clear legal duty then due at the

MANDAMUS—CONTINUED.

- hands of the party against whom relief is sought.—
Northwestern Warehouse Co. v. Oregon Ry. & N. Co..... 218
2. *Parties—Official Capacity.* A petition in which the averments relate to the appellants as county commissioners and the prayer is that, as such, they be required to make a tax levy, sufficiently brings them into court in their representative and not in their individual capacity.—*State ex rel. Evers v. Byrne*..... 264
 3. *Emergency for Alternative Writ.* In an application for an alternative writ of mandamus to the county commissioners to levy a tax, sufficient emergency is shown by the fact that the tax levy must be decided at the session then being held and within one week; and the relator was not required to show why he did not make application sooner.—*Id.*..... 264
 4. *Demand.* Where the county commissioners are required by law to levy a tax to meet a certain charge, and have actual knowledge of the law, and admit knowledge of the essential facts, and deny that they are required to make the levy, and it is apparent from their course that a demand would be useless, no demand is necessary prior to the issuance of an alternative writ, although the levy may serve a private interest.—*Id.*..... 264
 5. *Doubtful Case.* Where the intent of the law is clear, it can not be said that there is such doubt as to prevent the issuance of a writ of mandamus.—*Id.*..... 264
 6. *Taxation—Interest of Bondholder.* It cannot be objected that the relator, asking for a tax levy to meet interest on bonds, is the holder of only one series of the bonds, as he could not ask for a levy in his own behalf only, thereby gaining a preference.—*Id.*..... 264
 7. *Same—Levy After Tax Rolls Are Completed.* It cannot be objected to the issuance of a writ of mandamus requiring a tax levy that the tax rolls are already completed and partly collected, and that it will be an inconvenience to levy and collect the amount wrongfully omitted from the rolls in the first instance.—*Id.*..... 264
 8. *Same—Discretion in Distributing the Tax.* Where the lower court has ordered a tax levy to meet interest on bonds that has accumulated for several years owing

MANDAMUS—CONTINUED.

to the failure of the proper officers to levy the tax, it cannot be said that there was abuse of discretion in not distributing the tax over a number of years.—*Id.*..264

9. *Against Sheriff—Compelling Release of Exempt Property—Inadequacy of Replevin.* Mandamus will lie to compel a sheriff to release exempt property held by him under attachment for the reason that replevin does not furnish a speedy remedy, since it may result in withholding possession from the debtor until the end of an extended litigation.—*State ex rel. Hill v. Gardner.* 552

10. *Same.* Under Bal. Code, § 5755, which provides that mandamus will lie "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," a sheriff is bound to return upon demand exempt goods which he has levied upon, where the creditor has not demanded an appraisalment thereof within a reasonable time, inasmuch as Bal. Code, § 5255, provides that upon the debtor's furnishing the officer with a list of his personal property, together with that claimed as exempt, the officer shall return with his process the list of property claimed as exempt, in case no appraisalment thereof had been required by the creditor.—*Id.*..... 552

See CARRIERS, 2; SCHOOLS AND SCHOOL DISTRICTS, 4.

MASTER AND SERVANT.

1. *Torts of Servant—Joint Liability.* An action for tortious negligence may be maintained against the master and his employee jointly, where the injury was caused by the act of the latter (*Howe v. Northern Pacific Ry. Co.*, 30 Wash. 569, followed).—*McHugh v. Northern Pacific Ry. Co.*..... 30
2. *Injury to Employee—Contributory Negligence.* In an action by a railway employee against the company to recover for injuries recovered by being struck by a fast passenger train while riding upon a hand-car a nonsuit was proper, when it appeared that the accident happened near a small station at which this train did not stop, but was accustomed to go by at full speed; that the plaintiff had worked for the company at that point for four years and knew the train was due and would

MASTER AND SERVANT—CONTINUED.

- pass at full speed; and that prior to the accident he was not looking and listening for it, and failed to notice the headlight until he was struck; there being no positive evidence that the whistle and bell were not sounded as was customary, but merely that the witnesses did not hear them.—*Id.* 30
3. *Negligence—Safe Appliances.* Where plaintiff, an engineer in charge of a donkey engine in a logging outfit was injured by the breaking of a small and defective swamp hook, used to pull a large water tank, and the large swamp hook usually employed for that purpose was at the time attached to the donkey, holding a block in place, and no other hook was provided by the master, it is not a case of the proper selection by a servant from sufficient appliances concededly furnished by the master, but there was a dispute as to whether the master in the first instance had furnished the necessary available appliance, raising a question of negligence for the jury.—*Bailey v. Cascade Timber Co.* 319
4. *Vice Principals.* A foreman known as the "hook tender" in charge of a logging crew, whose duty it was to give directions both as to the operations and selection of appliances for moving from one location to another a donkey engine and a large water tank containing 600 or 700 gallons of water, by means of a swamp hook attached to a cable pulled by the engine, is, under the circumstances, a vice principal in his relations to the engineer and men of the crew and is charged with the duty of providing a sufficient swamp hook.—*Id.* 319
5. *Same.* Where such hook tender directs a laborer known as the "rigging slinger" to attach the swamp hook for the purpose of moving the water tank, the "rigging slinger" is a mere intermediary and the arm of the hook tender, and his negligence in selecting an insufficient swamp hook is the act of a vice principal and not that of a fellow servant.—*Id.* 319
6. *Same.* In such a case where the hook tender is in the immediate presence of the tank, and the large hook was only a few feet away, he owed the duty to see that the same was used.—*Id.* 319
7. *Same—Selection of Appliances.* A selection from suff-

MASTER AND SERVANT—CONTINUED.

- cient appliances actually furnished by the master, made by the person whose duty it is to make the selection, or made under his direction, is the act of a vice-principal, and in this case raises a question of negligence for the jury, conceding that sufficient appliances were furnished.—*Id.* 319
8. *Contributory Negligence.* The contributory negligence of the engineer in starting up the engine with a hard pull without first taking up six or seven feet of slack in the cable, as was usually done, is a question for the jury, where there was evidence that he obeyed the signal of the foreman for a hard pull, and also that the defective hook would have broken with any kind of a pull.—*Id.* 319
9. *Same.* Contributory negligence of the engineer, in that he knew of the use of the small swamp hook and did not object to it, is a question for the jury, where he denies such knowledge.—*Id.*..... 319
10. *Same—Appeal—Decision—Question for Jury.* In such a case, upon reversal, a motion to remand with instructions to have the damages assessed will be denied, as the questions of negligence and contributory negligence must be all submitted to the jury.—*Id.*..... 319
11. *Negligence of Master—Assumption of Risk.* A miner injured by the explosion of a missed blast, left in a mine by contractors who had done work there for defendant prior to such miner's employment, cannot be held to have assumed such danger as a risk of his employment, where he had no knowledge of such unexploded blast either through information from others or by personal inspection.—*McMillan v. North Star Mining Co.*..... 579
12. *Same—Safe Place to Work—Unexploded Blasts—Duty of Master.* It is the duty of a mining company, although it has let a contract for tunneling, to keep itself advised as to the possibility of missed blasts, so as to be in a position to warn employees subsequently placed at work in the tunnel after the cessation of the contract work.—*Id.* 579
13. *Injury of Servant—Negligence—Sufficiency of Evidence.* In an action for damages for injuries received from the

MASTER AND SERVANT—CONTINUED.

accidental discharge of a gun which defendant was alleged to have permitted a party of hunters to bring aboard a tugboat as passengers, the dismissal of the action was not error, when there was no testimony showing that the gun belonged to or was brought upon the boat by any of the hunters, or to whom it in fact belonged, or in what manner it had been discharged.

—*Sanders v. Stimson Mill Co.*..... 627

14. *Same—Injury to Seaman—Liability of Ship for Expense of Cure.* A seaman who receives an injury while in the service of the ship is, under maritime law, entitled to medical care, medicine, and nursing necessary in effecting a cure, at the expense of the ship, and in an action against the owner therefor, he is entitled to recover the amount expended, whether or not the owner's negligence be proven, and regardless of whether he was nursed aboard ship or at his own home.—*Id.*.... 627

MECHANICS' LIENS.

Date of Commencement for Furnishing Materials. The inception of a material man's lien is governed by the date of the actual furnishing of materials and not by the date of the contract therefor.—*Keene Guaranty Savings Bank v. Lawrence*..... 572

MINES AND MINERALS. See APPEAL, 24; MASTER AND SERVANT, 11, 12.

MONOPOLIES.

Restriction of Transportation Facilities. A monopoly in the warehouse business in a locality is not shown by the fact that the business was restricted to locations upon the lands of a railway company, when it further appears that for years various persons owned and operated warehouses thereon, among them one of the plaintiffs, and that the right was open to the plaintiffs to engage in the business upon the same terms and with like facilities as were enjoyed by existing warehouses. *Northwestern Warehouse Co. v. Oregon Ry. & N. Co.*.... 218

See CONSTITUTIONAL LAW.

MORTGAGES.

1. *Foreclosure—Question of Paramount Title.* The question of paramount title may be determined in a suit to foreclose a mortgage, if the parties voluntarily submit such question for determination.—*Cookidge v. Schering.* 557
2. *Priority—Estoppel.* Knowledge by a mortgagee of an action seeking to establish a prior lien over the mortgaged premises in favor of another would not estop the mortgagee from denying the validity of a decree declaring a prior lien, when the mortgagee had not been made a party to the action and served with process.—*Keene Guaranty Savings Bank v. Lawrence.*..... 572
3. *Same—Assignee Not Bound by Assignor's Knowledge of Equities.* Knowledge on the part of the assignor of a mortgage that a third party had an equitable lien against the premises would not affect the rights of an assignee who took without knowledge actual or constructive, of the rights of such third party.—*Id.*..... 572

See EXECUTORS AND ADMINISTRATORS, 1; LIMITATION OF ACTIONS, 1, 2; NOTARY PUBLIC; PARTIES; VENDOR AND PURCHASER, 1.

MUNICIPAL CORPORATIONS. See DEATH; NEGLIGENCE, 1; OFFICE AND OFFICERS, 1-4.

NEGLECTENCE.

1. *Defective Streets—Contributory Negligence.* In an action for personal injuries received by falling into an unguarded trench in the street, the plaintiff is guilty of contributory negligence as a matter of law, where it appears that she knew the location of the trench, that it was wide and deep, with slippery banks, that she had jumped across it the same afternoon, and was injured in attempting to re-cross it after dark without the aid of lights.—*Hobert v. Seattle.*..... 330
2. *Obstruction in Highway—Frightening Horses—Questions for Jury.* Whether defendant was negligent in piling old planks on a highway close to the traveled part, without any authority therefor and without any showing of necessity except that the planks would have slid down and injured the abutting owner's fence if they had been placed off the traveled way, on the slope

NEGLIGENCE—CONTINUED.

of the embankment, and whether the obstruction was of such a character as to frighten horses, were questions for the jury in an action for injuries caused by plaintiff's horse shying at such obstruction.—*Selby v. Vancouver Water Works Co.*..... 522

3. *Same—Instructions—Reasonable Necessity for Obstructions.* In an action for damages because of injuries occasioned by the fright of a horse at debris placed along the side of a public highway by defendant, a charge to the jury that if it was not reasonably necessary for defendant in making improvements to use the highway for piling and burning debris, then defendant had no right to use it for that purpose, and plaintiff could recover damages for injuries occasioned thereby, was a proper statement of the law.—*Id.*..... 522

See CARRIERS, 3; DAMAGES, 2, 4; MASTER AND SERVANT, 1-9, 11-13; RAILROADS, 1-4.

NEGOTIABLE INSTRUMENTS. See BILLS AND NOTES.

NORMAL SCHOOLS. See SCHOOLS AND SCHOOL DISTRICTS, 7.

NOTARY PUBLIC.

Mortgage to Corporation—Acknowledgment Before Corporate Officer. The fact that a notary public is an officer in a corporation to which a mortgage is executed would not preclude his taking the acknowledgment of the mortgagor, as that is merely a ministerial act.—*Keene Guaranty Savings Bank v. Lawrence.*..... 572

See ACKNOWLEDGMENT.

OFFICE AND OFFICERS.

1. *Officers of Municipal Corporations—Removal.* Under Seattle Charter, art. 16, § 12, providing that any officer "may be removed by the appointing power only upon filing" with the civil service commission written charges, which may be investigated, and, if not sustained by the commission the officer is to be reinstated, and art. 24, § 8, giving each officer the power to remove any employee appointed by him, unless otherwise provided, the civil service commission has no power to remove

OFFICE AND OFFICERS—CONTINUED.

- the night clerk in the police department, appointed by the chief of police from among applicants who had passed the civil service examination, the chief of police having declined to make the removal.—*Eason v. Seattle*, 405
2. *Same*. Acquiescence by the chief of police in such removal by the civil service commission does not deprive the clerk of his office.—*Id.*..... 405
3. *Same*. The power of removal is inherent in the appointing power unless otherwise clearly provided by statute.—*Id.* 405
4. *Same*. The civil service commission of Seattle is not vested with any actual power of appointment or removal, its functions being to prescribe tests of fitness, and to act as a check upon improper removals.—*Id.*.... 405

PARTIES.

Parties Defendant—Estoppel of Plaintiff to Dispute Interest. Where a mortgagee makes parties defendant to his action for foreclosure and seeks relief against them, under the allegation that they claim some interest in the premises inferior to his own, they have a right to insist that he set up a valid cause of action in himself before being called upon to plead their own title.—*Gleason v. Hawkins*..... 464

See APPEAL, 11; ASSIGNMENTS; BILLS AND NOTES, 2;
MANDAMUS; MASTER AND SERVANT, 1.

PARTY WALLS.

Party Wall Agreement—Covenant Running With Land—Enforcement After Conveyance by Covenantee. Where the owners of adjoining lots, on which a party wall had been constructed, under an agreement making the promise to pay one-half the expense thereof a covenant running with the land, united in a conveyance of one of the lots by warranty deed without reservation whatever, the grantee acquired the lot and the portion of the wall thereon freed from any liability under the covenant for repayment of one-half its cost.—*Kinnear v. Moses*..... 215

PLEADING.

1. *Issues—Effect of Sustaining Demurrer to Reply.* In an action on a life insurance, to which the company set up the defense that the application therefor had never been signed by deceased and that the copy furnished plaintiff purporting that he had signed same was a mistake on the company's part, the sustaining of a demurrer to a reply setting up estoppel to deny the signature, but which failed to deny the affirmative allegations of the answer, would leave no issue upon the genuineness of the signature of the insured.—*Hughes v. New York Life Ins. Co.*..... 1

2. *Counter Claim—Damages for Wrongful Attachment.* A counterclaim for damages arising out of the wrongful issuance of an attachment cannot be pleaded in answer to a complaint in the original action, though the attachment had been dissolved prior to filing of the counterclaim, since such defense would not fall within the purview of Bal. Code, § 4913, permitting counterclaims where defendant has a cause of action connected with the subject of plaintiff's action.—*Tacoma Mill Co. v. Perry*..... 650

3. *Inconsistent Defenses.* A denial of a cause of action arising out of a trust relation and the receipt of money from the sale of land is not inconsistent with a plea of the statute of limitations, setting up a repudiation of any trust relation more than three years prior to the commencement of the action, as both allegations may be wholly true.—*Irwin v. Holbrook*..... 349

4. *Conclusions.* Neither conclusions nor probative facts should be pleaded, but the allegation of a fact will not be affected by the addition of conclusions or redundant matter.—*Brummett v. Campbell*..... 358

5. *Verification—Amendments Deemed to Have Been Made.* A motion to quash a proceeding to foreclose a tax certificate because the complaint is not properly verified, is properly overruled, as Bal. Code, § 6535, requires the court to "consider all amendments which could have been made as made."—*Smith v. Newell*..... 369

6. *Amendments.* It is proper to allow an answer to be amended to correspond with the proofs after a case has

PLEADING—CONTINUED.

been appealed and remanded for a new trial.—*Jones v. Western Manufacturing Co.*..... 375

See APPEAL, 28; ATTACHMENT; BROKERS, 2; CONTRACTS, 2; HIGHWAYS, 1; TAXATION, 2.

PRINCIPAL AND AGENT. See BROKERS; LANDLORD AND TENANT, 3.

PRINCIPAL AND SURETY.

Contractor's Bond—Waiver of Contract Conditions—Discharge of Surety. A guaranty company which, for a compensation, becomes surety upon the bond giving a building contractor for the faithful performance of his contract cannot escape liability by reason of deviations from the exact terms of the contract, where such provisions were waived by the contractor and no damage is shown as resulting to the surety by reason thereof.—*Cowles v. United States Fidelity & Guaranty Co.*..... 120

PROCESS.

1. *Summons—Service by Publication—Sufficiency.* Where the statute regulating service of summons by publication provides that such summons shall direct the defendant "to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action," a summons which requires the defendant to appear "within sixty days after the service of this summons upon you, exclusive of the day of service, and defend this action," would not confer jurisdiction upon the court to render judgment.—*Thompson v. Robbins*..... 149
2. *Same—Sufficiency of Affidavit.* An affidavit for publication of summons reciting that affiant is one of the attorneys of plaintiffs will be presumed in aid of judgment as stating the truth, where that fact is not negated by the record, even if affiant's name was not signed to the complaint as an attorney in the cause.—*Swanson v. Hoyle* 169
3. *Same—Service by Publication—Sufficiency.* Under Laws 1901, p. 384, § 1, subd. 2, authorizing service by publication in proceedings to foreclose tax liens, wherein the

PROCESS—CONTINUED.

owner of the property shall be directed to appear within sixty days after the date of the first publication (exclusive of the first day) and defend the action, publication requiring defendant to appear "within sixty days after the service of this notice and summons" was not a compliance with the statute, and hence failed to give the court jurisdiction.—*Smith v. White*..... 414

See TAXATION, 10-12.

PROHIBITION, WRIT OF.

Remedy by Appeal. Prohibition will not lie to restrain a superior court from entering a judgment logically flowing from its findings, even if the legal operation of a former judgment in the case as *res judicata* is thereby destroyed, since such action of the court would amount to error for which there is a remedy by appeal.—*State ex rel. Stetson & Post Mill Co. v. Superior Court*..... 489

See APPEAL, 8.

PROMISSORY NOTES. See BILLS AND NOTES.

PUBLIC LANDS.

1. *Incorporation in Indian Reservation—Executive Order.*
Public lands of the general government may be made part of an Indian reservation by means of an executive proclamation of the president of the United States.—*Jones v. Callvert*..... 610
2. *Same—Tide Lands Patented to Indians—Title of State.*
Under the Enabling Act (25 St. at Large, 676, § 4) for the admission of Washington into the union, requiring this state to disclaim all right and title to all lands lying within its limits owned or held by any Indian or Indian tribes, and under art. 17, § 2, of the state constitution, disclaiming title in all tide, swamp and overflowed lands patented by the United States, the state has no authority to sell tide lands within the limits of an Indian reservation and patented to individual members of the tribe prior to statehood.—*Id.*..... 610

See HUSBAND AND WIFE, 6.

QUIETING TITLE.

1. *Lis Pendens—Suit to Remove Cloud.* Under Bal. Code, § 5521, which provides that any persons in possession of real property may maintain a civil action against any person claiming an interest in said property, or any right thereto adverse to him, for the purpose of determining such claim, a suit to remove the cloud caused by the filing of a *lis pendens* notice in an action between other parties may be maintained by the owner, without awaiting the result of the action to which he is a stranger.—*King v. Branscheid* 634
2. *Same—Cancellation of Record.* Bal. Code, § 4887, which provides that in actions affecting title to real estate, where a *lis pendens* is filed, the court may, at any time after the action is settled, discontinued, or abated, order the notice canceled of record, on application of any person aggrieved, is cumulative of the remedy provided by Id., § 5521, in so far as it is applicable to persons not parties to the action in which the notice was filed.—*Id.*.... 634

RAILROADS.

1. *Killing Stock—Evidence.* In an action for the killing of stock on a railroad right of way through negligence in the operation of the train at a point where stock was frequently encountered and likely to be caught in a trap, the plaintiff is entitled to show lack of cattle guards, although not alleged, as descriptive of the place, and as bearing upon the degree of care required under the conditions existing at that point.—*Rafferty v. Portland, V. & Y Ry. Co.*..... 259
2. *Same—Negligence—Question for Jury.* Where a witness of the plaintiff testifies that a locomotive and train of eleven empty cars, running upon a down grade of one per cent. at the rate of ten or twelve miles an hour, could be stopped within sixty feet, negligence in failing to stop the train is a question for the jury, notwithstanding the testimony of the defendant's employees to the effect that the train was in all respects properly equipped and operated and that it could not have been stopped in any event before reaching the stock on the track about 400 feet away.—*Id.*.....259
3. *Same.* Where a train consisting of a locomotive and eleven empty cars was running on a down grade of one

RAILROADS—CONTINUED.

per cent. at about ten or twelve miles an hour at a point where stock was frequently encountered and likely to be caught in a trap, it is a question for the jury whether defendant was guilty of negligence in running at this place at such a rate of speed that the train could not be controlled.—*Id.*..... 259

4. *Killing Cattle—Failure to Fence—Natural Barriers.* The existence of natural barriers along a railway track would not excuse the company from liability for stock killed at that point, where there was free access to the track at the ends of such barriers, under Bal. Code, § 4832, which provides that "It shall be *prima facie* evidence of negligence on the part of defendant to show that the railroad track was not fenced so as to turn stock from the track."—*Taylor v. Spokane Falls & N. Ry. Co.* 450

RAPE.

Information—Crime Charged—Duplicity. An information charging that defendant committed the crime of rape by feloniously making an assault upon a female child of the age of fourteen years, and that he did then and there feloniously ravish, carnally know and abuse her does not charge more than one crime, but sufficiently charges the crime under that subdivision of Bal. Code, § 7062, which provides that a person shall be guilty of rape who shall carnally know any female child under the age of eighteen years.—*State v. Priest.* . . 74

See CRIMINAL LAW, 21, 22; STATUTES, 1.

RECEIVERS.

1. *Plurality of Funds—Payment of Claims.* A receiver appointed to take charge of the separate, community and partnership estates of an insolvent debtor, under a decree providing for the payment of each class of creditors primarily from the corresponding class of funds, cannot be compelled to pay a separate debt of the insolvent out of funds derived solely from the community estate of himself and wife, when it appears that the claims against that estate have not been satisfied.—*Cannon v. Snipes*..... 243

RECEIVERS—CONTINUED.

2. *Same—Funds Available for Receivership Expenses.*

Where but one receivership has been created to take charge of the partnership, community and individual estate of an insolvent debtor, funds derived from any of such estates are properly applicable toward payment of the expenses of the receivership.—*Id.*..... 243

REVIEW, WRIT OF. See CERTIORARI.

SALES.

1. *Breach of Warranty.* A warranty that a road engine was free from defects and imperfections and that the seller would replace all defective parts free of charge was broken, where the seller, after supplying new drums several times in place of those breaking because of defects in manufacture, refused to replace the last one breaking because of its inability owing to a strike at its works.—*Puget Sound Iron & Steel Works v. Clemens.* 36

2. *Same—Action on Breach—Measure of Damages.* The measure of damages upon the breach of a warranty to replace defective parts of a road engine free of charge to the purchaser would be the expense he was put to in replacing the broken parts elsewhere upon the seller's refusal to supply new ones, and would not include loss of profits in logging as within the contemplation of the parties, where the seller had no knowledge of the extent of the purchaser's operations, the number of logs he was hauling, the number of men or machines he was working, or the character or length of the roads the logs were hauled over (*Skagit Ry. & L. Co. v. Cole*, 2 Wash. 57, and *Graham v. McCoy*, 17 Wash. 63, distinguished.)—*Id.* 36

3. *Manufacture of Machinery—Completion Within Reasonable time.* In an action to recover the price of a boiler constructed upon defendant's order, the latter is not entitled, by way of counterclaim, to damages for delay in filling the order, when the contract provided that the boiler was "to be completed within six weeks after the arrival of the iron in Seattle," and the evidence shows that the plaintiffs had promptly placed their order for the necessary materials, but were delayed in their work

SALES—CONTINUED.

by inability to procure a certain thickness of steel plate, because of its not being in the market, and that, after getting the consent of the government inspectors to the substitution of thinner plates, they at once procured same and promptly completed the boiler within six weeks thereafter.—*Hopkins v. Seattle Scandinavian Fish Co.* 513

SCHOOLS AND SCHOOL DISTRICTS.

1. *Contract of Directors for Repairs—Validity.* The payment by the county treasurer of a school warrant issued by a board of directors in payment of services in repairing the school house rendered by themselves to the district may be enjoined at the suit of a citizen and taxpayer, although the amount involved is trivial and no one else could be procured to render the services, since contracts of that character are expressly forbidden by Bal. Code, § 2316.—*Miller v. Sullivan*..... 115
2. *Taxation — School Levy — Statutes — Repeal.* Laws of 1889-90, p. 48, § 5, providing that school directors must ascertain and levy annually the tax necessary to pay interest on bonds issued under authority thereof, was repealed by Laws 1897, p. 356, which provides (p. 393, § 97) that the directors shall annually ascertain the necessary amount, and report the same to the county commissioners, and that the latter shall make the levy; and this changes the method of tax levies in the case of outstanding bonds issued under the earlier act, in the absence of the impairment of any contractual right.—*State ex rel. Evers v. Byrne*..... 264
3. *Same.* It is competent for the legislature to provide that the amount of a school tax shall be determined by the school board, and to require that the ministerial act of making the levy be performed by the board of county commissioners.—*Id.* 264
4. *Mandamus—Interest on Bonds.* Where the school directors annually certify the amount necessary to pay interest upon school bonds, and the county commissioners neglect and refuse to make the required levy, mandamus will issue, on the application of the holder of part of the bonds, requiring the levy to be made.—*Id.*.. 264

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

5. *Re-election of Teachers—Acceptance—Discharge.* Where a teacher is re-elected for the ensuing year, and thereafter expresses her gratification to the secretary of the board that she is to have her same work, and during vacation consults with the principal, at his request, in regard to her proposed work, acceptance on her part is sufficiently shown, and the dispensing with her services subsequently upon abolishing the line of work she had conducted, without giving her an opportunity to accept or refuse other work in the school, amounts to a breach of the contract.—*Mackenzie v. State*..... 657

6. *Same.* The acceptance of an offer to teach conveyed by a re-election of a teacher is established by her conference during vacation with the newly elected principal concerning the character of her work for the ensuing year, and a resolution of the board annulling her employment on the ground that it would not be for the best interests of the school amounts to a breach of contract.—*Id.* 657

7. *Normal Schools—Teachers—Certificates of Qualification—Necessity.* The certification of qualification of teachers of "higher and special institutions" not being required under that portion of the "Code of Public Instruction" (Laws 1897, title 4, p. 427) devoted to such institutions, but it being the evident intent of the law that such certification shall apply only to teachers under the common-school system, one would not be incapable of entering into a contract to teach in one of the normal schools of the state by reason of not holding a teacher's certificate.—*Id.*..... 657

8. *School Lands—Improvements.* The person lawfully in possession of school lands and improvements thereon has a right to retain the same until they are paid for.—*Brummett v. Campbell*..... 358

9. *Text Books—Contract of State Board—Change of Course of Study.* After the state board of education has adopted a series of text books, and prescribed a course of study, and made a contract with a publisher for the use of its books for five years in certain grades of the public schools, a county board will be enjoined from so

SCHOOLS AND SCHOOL DISTRICTS—CONTINUED.

changing the course of study for such grades that approximately twenty per cent less students in the schools of a city will use such books during the year.—*Rand, McNally & Co. v. Hartrant*..... 378

10. *Same*—*Reviewing State Board of Education*. The fact that such a course of study was inadvisable is immaterial, and the courts cannot review the action of the state board except for fraud.—*Id.*..... 378

11. *Same*—*Statutes—Impairing Obligation of Contract*. The contract of the state board of education for the purchase of school books for a period of five years cannot be impaired by subsequent legislation.—*Id.*..... 378

See EQUITY, 1-3.

SEAMEN. See MASTER AND SERVANT, 14.

SETOFF AND COUNTERCLAIM. See PLEADING, 2.

SHERIFFS AND CONSTABLES. See MANDAMUS, 9, 10.

SHIPPING. See MASTER AND SERVANT, 14.

SODOMY. See DIVORCE, 4.

STATE LANDS. See EQUITY, 1-3; SCHOOLS AND SCHOOL DISTRICTS, 8.

STATUTES.

1. *Amendment—Title*. Laws of 1897, p. 19, entitled "An act amending section 28 of the Penal Code of the State of Washington relating to the crime of rape," setting forth in full the section as amended does not violate art. 2, § 37, of the constitution providing that no act shall be amended by mere reference to its title, but that the revised act shall set forth in full; and it is not necessary to refer in its title to the title of the act amended.—*State v. Scott*..... 279

2. *Same*. Such act is not unconstitutional as failing to express the subject of the act in the title, as the subject is sufficiently expressed either as an amendatory act or as an independent act, treating the references to existing statutes as surplusage.—*Id.*..... 279

STATUTES—CONTINUED.

3. *Title.* It was competent for the legislature to enact the penal code of 1881 with the comprehensive title, "An act relative to crimes and punishments and proceedings in criminal cases," but provisions of a civil nature could not be included therein.—*State v. Tieman*..... 294
4. *Same—Bastardy Proceedings.* A bastardy proceeding against a putative father for the support of his illegitimate child, commenced by summons and tried as a civil action, with judgment and execution against his property, is a civil proceeding, and the provisions therefor enacted in 1881 as part of the penal code, are not embraced within the title of the act, which relates only to crimes and punishments.—*Id.*..... 294
5. *Repeal by Implication—Setting Forth Statute As Amended—Gambling.* Section 37 of article 2 of the state constitution, which provides that "no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length," does not apply to cases where a later act, designed as a complete law in itself, repeals by implication a former law on the same subject, and hence Laws 1903, p. 63, making gambling a felony is not invalid by reason of the failure to set it forth as an amendment of Bal. Code, § 7260, which defines the same acts of gambling as constituting a misdemeanor.—*In re Dietrick*..... 471

See APPEAL, 19; EXECUTION, 1; HOMESTEAD, 1;
SCHOOLS AND SCHOOL DISTRICTS, 2; TAXATION, 11;
TIMBER.

SUMMONS. See PROCESS; TAXATION, 10-12.

SUPERSEDEAS.

Issuance by Supreme Court in Aid of Appellate Jurisdiction—Futility of Appeal—Effect. A writ of superseas will not issue from the supreme court to stay a judgment of the superior court pending appeal, where it appears that the controversy will have ceased at the time of the hearing of the appeal in regular course, since it is the intent of art. 4, § 4, of the constitution that writs in aid of the court's appellate jurisdiction shall be issued only in cases when necessary and proper

SUPERSEDEAS—CONTINUED.

to the complete exercise of such jurisdiction and when the appeal would afford inadequate remedy.—*State ex rel. Cawley v. Bremerton*..... 508

TAXATION.

1. *Foreclosure of Delinquency Certificates—Several Judgment—Separate Lots Jointly Assessed.* Under Laws 1899 p. 300, which provides that, in cases of tax foreclosure, the "judgment shall be a several judgment against each tract or lot or part of a tract or lot for each kind of tax or assessment included therein," a judgment of foreclosure against two lots jointly is a several judgment, where it appears that the two lots constitute but one indivisible tract by reason of their use as one tract in connection with a building erected upon both lots.—*Swanson v. Hoyle*..... 169
2. *Same—Pleading.* In an action for the foreclosure of a tax delinquency certificate issued by the county treasurer, upon two lots, it is unnecessary to aver in the complaint that the two lots constitute one indivisible tract, as the presumption is the officer would not have issued the certificate in that form unless such were the fact. *Id.* 169
3. *Same—Judgment Including Illegal Tax.* The fact that judgment upon a tax foreclosure included taxes not lawfully assessed against the property is not ground for the vacation of the judgment, where the owner has been regularly summoned to appear and has had an opportunity to defend against the legality of any portion of the tax.—*Id.*..... 169
4. *Same—Authority of Assistant Prosecuting Attorney in Tax Foreclosure Proceedings.* An assistant prosecuting attorney is *ex officio* one of the attorneys for plaintiff where an action for foreclosure of a delinquency tax certificate is brought by the prosecuting attorney under laws 1899, p. 296.—*Id.*..... 169
5. *Arbitrary Assessment—Recovery of Tax Paid—Evidence.* In an action to recover taxes paid under protest, and alleged to have been fraudulently and arbitrarily assessed without regard to the true value of the land, it is proper to exclude oral evidence that the assessor

TAXATION—CONTINUED.

- increased the assessment of prior years, as the same was not the best evidence and was immaterial.—*Carlisle v. Chehalis County*..... 284
6. *Same*. In such action it is proper to receive in evidence on the part of the defendant, as bearing on the good faith of the assessor, and the arbitrariness of his action, (1) letters from owners and his agent which were in reply to inquiries by the assessor as to their estimate of values; (2) testimony as to the methods pursued by and the duties of his deputy; (3) a certified copy of a deed just prior to the assessment showing a consideration in excess of the valuation; and (4) evidence that, upon objecting before the board of equalization, the owner's agent stated orally that he "had no kick coming."—*Id.* 284
7. *Same—Appeal—Review of Findings*. In such action findings will not be disturbed where the evidence shows that the assessor made reasonable effort to ascertain the value and exercised his best judgment in fixing the same.—*Id.* 284
8. *Tax Sales—Inadequacy of Price*. Inadequacy of price is not a valid objection to the sale of land for taxes.—*Rothchild Bros. v. Rollinger*..... 307
9. *Tax Deed—Recording—Bona Fide Purchaser—Lien for Taxes Paid*. The owner of land sold for special irrigation taxes several years after he had acquired title cannot object that the tax deed was not recorded, and that he was an innocent purchaser by reason of subsequently paying general taxes; but he has a lien on the land for the taxes paid by him in good faith.—*Id.*..... 307
10. *Tax Foreclosure—Summons—Time for Appearance*. Under Laws 1897, p. 182, § 96, subd. 3, requiring defendants in tax foreclosure cases to appear within sixty days after service of summons, exclusive of the day of service, and under Bal. Code, § 4878 (which, by Laws 1897, p. 182, § 97, is made applicable in tax cases), providing for the publication of summons in a newspaper once a week for six consecutive weeks, and that the service should not be complete until the expiration of the time prescribed for publication, a defendant in a tax foreclosure suit under the revenue law of 1897 would

TAXATION—CONTINUED.

have sixty days for appearance after the completion of the publication of summons.—*Woodham v. Anderson*... 500

11. *Same—Amendment of Statute—Effect on Pending Cases.* Where, pending the completion of service by publication, the law governing it is changed by amendment so as to alter the procedure, and no provision is enacted in the new law making it apply to pending cases or expressly repealing the old law, the question of the sufficiency of the summons to confer jurisdiction would be determined by the law in force at the time of its issuance.—*Id.* 500
12. *Delinquency Certificate—Foreclosure—Summons.* A summons in a tax foreclosure of a certificate of delinquency subscribed by "M. L. Agent for" the plaintiff, followed by his place of residence in this state, is sufficient under Laws 1901, p. 384, providing that it shall be subscribed by the plaintiff or some one in his behalf, residing in the state.—*Smith v. Newell*..... 369
13. *Same—Notice of Dividing the Tax.* A certificate of delinquency upon one half of a tract of land, divided and apportioned at the request of the holder, under Laws 1889, p. 285, is not void because the county treasurer failed to give notice by registered mail to the owners, interested that they might protest against such apportionment, as required by § 11, p. 294, in view of the further provision (§ 18, p. 299) that no error or informality in the proceeding shall vitiate the tax, but that the court may correct defects in the foreclosure action, where the apportionment made was found by the court to be just to the owners complaining.—*Id.*..... 369
14. *Same.* Where the owners are given their day in court, and an opportunity to question the tax, and it appears to be just, the court ought not to declare the tax void because of the omission of a ministerial officer to perform a statutory duty, but a showing of injury incapable of correction is necessary.—*Id.*..... 369

See APPEAL, 19; MANDAMUS, 2-4, 6-8; PROCESS, 3;
SCHOOLS AND SCHOOL DISTRICTS, 2-4; WATERS AND
WATER COURSES, 2.

TIDE LANDS. See PUBLIC LANDS, 2.

TIMBER.

Cutting and Removal of Standing Timber—Whether Felony or Misdemeanor—Construction of Statutes. Prosecutions for cutting and removing timber fall exclusively under Bal. Code, § 7141, which is addressed to that offense as a misdemeanor, and hence Id., §§ 7108, 7109, defining grand and petty larceny as the felonious stealing and taking away of the personal property or goods of another are superseded by the latter enactment of Id., § 7141, in so far as the act of cutting and stealing timber is concerned.—*Tacoma Mill Co. v. Perry*..... 650

TRIAL.

1. *Verdict—Conflict Between General and Special.* In such a case, a special verdict finding the above facts, and that the plaintiff knew it was dangerous to attempt to cross on account of the darkness and slippery bank, is in conflict with and controls a general verdict for the plaintiff, and it is error to refuse the defendant judgment thereon.—*Hobart v. Seattle*..... 330
2. *Verdict—Irregularity.* A verdict will not be set aside by reason of the fact that it had been obtained by computation, through the process of adding together the amounts favored by each individual juror and dividing the total by twelve, where it does not appear that an agreement was entered into by the jurors in advance to so agree upon a verdict.—*Stanley v. Stanley*..... 489
3. *Delay in Filing Pleadings—Excuse—Discretion of Court.* The sufficiency of defendant's excuse for delay in filing answer to a complaint after the setting aside of the original judgment therein is a matter resting largely in the discretion of the trial court for determination.—*Woodham v. Anderson*..... 500
4. *Attorney as Witness—Waiver of Right to Argue Cause—Rules of Court.* Under Bal. Code, § 4993, subd. 5, which provides that parties litigant may address the court and jury, either in person or by counsel, a party may waive his right to argument, and a rule of court depriving an attorney of the right to argue his cause to the jury, when he has given evidence on the merits in behalf of his client, creates a condition which amounts to a waiver of the right, and therefore in no

TRIAL—CONTINUED.

- sense conflicts with the privilege conferred by the statute.—*Voss v. Bender*..... 566
5. *Admission of Evidence—Exclusion of Cross Examination in Deposition.* The refusal of the court to admit in evidence the cross-examination contained in a deposition until the direct examination had been first offered and read was not error, where the cross-examination was unintelligible without the direct examination to explain it.—*Von Tobel v. Stetson & Post Mill Co.* 683
6. *Instructions—Comment on Case.* A statement by the judge that "Here we come to some of the most important allegations on the part of the plaintiff, and to some of the most important issues of the case," was not reversible error in the absence of a showing of special injury to the party complaining.—*Id.*..... 683

See APPEAL, 29; BROKERS, 1, 3, 4; CRIMINAL LAW, 7-10, 14, 23; EQUITY, 2; GAMBLING, 4; HOMICIDE, 2; HUSBAND AND WIFE, 4; NEGLIGENCE, 3; RAILROADS, 2, 3.

TRUSTS. See EXECUTORS AND ADMINISTRATORS, 6; LIMITATION OF ACTIONS, 4; VENDOR AND PURCHASER, 3.

VENDOR AND PURCHASER.

1. *Unauthorized Conveyance by Corporate Officer—Ratification—Title Acquired—Lien of Prior Unrecorded Mortgage.* A mortgagee of land belonging to a corporation who fails to have his mortgage recorded, has no lien as against a subsequent grantee under a conveyance unauthorized by the corporation, who takes without notice of the prior mortgage, if the circumstances are such as to estop the corporation from denying the authorization.—*Coolidge v. Schering*..... 557
2. *Contract of Sale—Conditional or Absolute—Construction.* A contract for the sale of land should be construed as conditional and not absolute, when its terms provided that the vendor should convey to the purchaser the lands described on payment of the taxes due and to become due, the principal and interest of a certain mortgage then a lien on the premises, and a sum which, together with such payments, would make \$20,000,

VENDOR AND PURCHASER—CONTINUED.

to be paid in installments at fixed times; that the purchaser should pay the taxes then due on or before a certain date, but expressly exempting him from agreeing to make any of the other payments; that, if any one payment is not made when due, all previous payments shall be forfeited at the option of the vendor, but should not "affect the parties as to any of said land already sold and conveyed," under an agreement contained in the contract which provided that the vendor would convey to third parties certain of the lands on payment by the other party to the contract of a fixed price per acre according to location; the rate for the entire contract in case of a consummation of sale by the purchaser being about \$90 per acre, while the agreement for sale in parcels fixed a rate ranging from \$125 to \$300 per acre.—*Title Guarantee & Trust Co. v. McDonnell*..... 418

3. *Same—Novation—Trust Agreement—Effect.* A contract between an owner of land and another provided in effect for a sale of the entire tract at a specified price, payable in installments, with condition of forfeiture, and that, on payment to the vendor or application on a mortgage on the premises, any parcel of a certain portion would be conveyed to any one designated by the purchaser. Thereafter the vendee assigned his contract to a trust company, which for a consideration was to carry out the vendee's plans and contracts. Subsequently judgments were entered against the vendor, preventing the free transfer of the property, and a contract was executed between the trust company and the vendor, which was denominated "a declaration of trust." It recited the other contracts, that the trust company should be made "trustee" of the vendor, and that the lands had been conveyed to it; provided for a forfeiture in case the trust company should not collect moneys growing due under sales made by it to third parties; required a cash payment by the trust company to the vendor and the satisfaction of the judgments from moneys coming due under the original contract; and provided for the payment of certain damages claimed against the original purchaser. Subsequently it was found necessary to arrange for releases by the mortgagee of parcels sold, and a party was procured to purchase the mortgage. All four parties then united in a contract, reciting all the

VENDOR AND PURCHASER—CONTINUED.

others, designating the trust company as "trustee" for the vendor, and providing for releases of the parcels sold as contemplated by the first contract on payment of specified sums per parcel. *Held*, that the trust company did not become a mere trustee as to the vendor, and entitled to compensation for its services, but stood in the place of and had the same rights and privileges as, the purchaser.—*Id.*..... 418

See PARTY WALLS.

VERDICT. See ASSAULT AND BATTERY, 1-4; CRIMINAL LAW, 27; EJECTMENT, 2; TRIAL, 1, 2.

WAREHOUSEMEN. See MONOPOLIES.

WATERS AND WATERCOURSES.

1. *Irrigation—Organization of District—Petition.* Bal. Code, § 4166, providing for the organization of an irrigation district upon the petition of "fifty or a majority of holders of title," does not require fifty in any event, but a petition by forty-two freeholders, constituting more than a majority, is sufficient.—*Rothchild Bros. v. Rollinger*..... 307
2. *Same—Assessments—Tax Sale.* Bal. Code, § 4192, regulating the sale of lands for delinquent irrigation assessments, does not require the officer making the sale to designate in writing any particular portion which he proposes to sell, but it is sufficient if the record recites that he designated the portions at the time of sale.—*Id.* 307

WITNESSES.

1. *Cross-Examination of Accused.* Cross-examination of the accused, when testifying in his own behalf, as to his past life, conduct, habits, and associates was proper, where, in his direct examination, he had given testimony as to his life, occupation, and habits at the various places where he had resided from childhood down to date of the crime with which he was charged.—*State v. Melvern*..... 7
2. *Credibility.* Where an accused testifies in his own behalf, he is subject to cross-examination to impair his

WITNESSES—CONTINUED.


- credit as a witness to the same extent that any other witness is.—*Id.* 7
3. *Credibility—Improper Examination of Witness.* The attempt to affect the credibility of a witness by asking him if he had ever been arrested for robbery was harmless error, where the witness answered that he was acquitted of the charge.—*State v. Ripley*..... 182
4. *Recall for Purpose of Explaining Testimony.* Permitting the recall of plaintiff for the purpose of explaining her testimony as given originally on the witness stand, and which had apparently been contradicted by the testimony of another witness, would not constitute prejudicial error, especially where the contradictory testimony had been elicited by means of improper cross-examination.—*Bailey v. Seattle & Renton Ry. Co.*..... 640
5. *Same—Improper Cross-Examination—Impeachment.* Testimony improperly elicited on cross-examination cannot be contradicted by the introduction of impeaching testimony.—*Id.* 640
6. *Same—Declarations Not in Presence of Party—Rebuttal.* Declarations prejudicial to plaintiff, made by one not in her presence, cannot be introduced for the purpose of rebuttal, or to impeach the testimony given by one of her witnesses.—*Id.* 640
7. *Cross-Examination.* Cross-examination relating to matters not touched upon in chief is properly excluded.—*Jones v. Western Mfg. Co.*..... 375
8. *Rebuttal—Repeating Questions.* The refusal to permit the witness on rebuttal to answer a question the second time does not require a reversal.—*Id.*..... 375

See CRIMINAL LAW, 4.

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